IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

—v.—

STOP H-3 ASSOCIATION, a Hawaiian non-profit corporation, MOANALUA VALLEY COMMUNITY ASSOCIATION, a Hawaiian non-profit corporation, and HAIKU VILLAGE COMMUNITY ASSOCIATION, a Hawaiian non-profit corporation, for themselves and on behalf of their members; FRANCES M. DAMON, HARRIET DAMON BALDWIN, HELEN HOPKINS, KENT MILLER, JOHN MANNING, HAROLD FUJIWARA and VIRGINIA BROOKS, for themselves and on behalf of all other persons similarly situated; MOANALUA GARDENS FOUNDATION; HUI MALAMA AINA O KO'OLAU; LUCY S. NALUAI; OLIVIA PADEKEN; LEROY CHUNG; RANDY KALAHIKI; PHOEBE KAWELO; ROXANNE VELARDE; WILLIAM T. COLEMAN, JR., individually and as Secretary of the United States Department of Transportation; and RALPH SEGAWA, individually and as Hawaii Division Engineer, Federal Highway Administration,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner E. Alvey Wright, Director of the Hawaii Department of Transportation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 533 F.2d 434, and are reprinted in the Appendix hereto, pp. 1a-31a, *infra*. The opinion of the District Court for the District of Hawaii is reported at 389 F. Supp. 1102, and is reprinted in the Appendix, pp. 34a-64a, *infra* (hereinafter referred to as "App.").[1]

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[1] Prior decisions of the District Court on an aspect of the litigation not involved in this Petition are reported at 353 F. Supp. 14 (1972) and 349 F. Supp. 1047 (1972).

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1976. A timely Petition for Rehearing and Suggestion for Hearing *En Banc* was denied on May 21, 1976, with one judge dissenting as to the Petition. (App. 32a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The basis of jurisdiction in the District Court was 28 U.S.C. § 1338(a).

QUESTIONS PRESENTED

The provisions of Section 4(f) of the Department of Transportation Act of 1966 and Section 18 of the Federal-Aid Highway Act of 1968 impose certain conditions on the approval of any highway program which "requires the use of . . . any land from a historic site of national, state, or local significance as so determined by" "the federal, state, or local officials having jurisdiction thereof." The questions presented in this litigation are:

1. Whether these statutory provisions apply to a privately-owned alleged "historic site" determined to be of no state or local significance by the State of Hawaii officials having jurisdiction over the site, and of no national significance by the Interior Department, by virtue of a determination by the Interior Department that the site is of *local* significance?

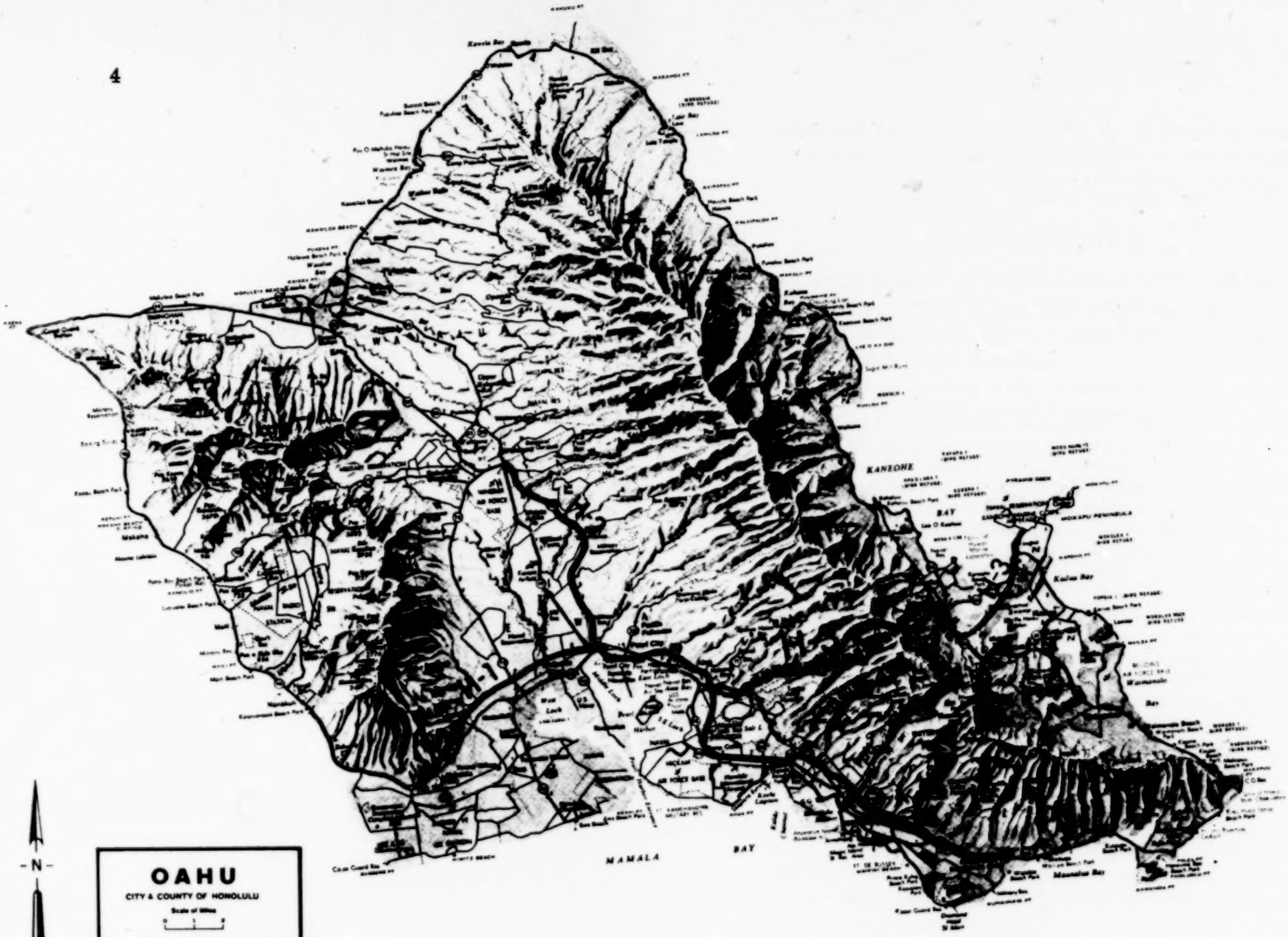
2. Whether these statutory provisions apply to a petroglyph rock, which is not a "site" at all, which had previously been moved from its original location, and which will be

fully protected in its present position by an agreement characterized by the Advisory Council on Historic Preservation to be satisfactory for this purpose?

STATUTES INVOLVED

Section 4(f) of the Department of Transportation Act of 1966, as amended, 82 Stat. 824, 49 U.S.C. § 1653(f), and Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. § 138 (hereinafter jointly referred to as Section 4(f)), are identical. They provide as follows:

> "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."



HAWAII INTERSTATE AND DEFENSE HIGHWAY SYSTEM
ROUTE H-1, H-2 AND H-3
ISLAND OF OAHU

INTRODUCTORY STATEMENT

This case involves the construction of the Moanalua Valley section of Route TH-3,[2] an interstate and defense system highway from Pearl Harbor to Kaneohe Marine Corps Air Station, in the Honolulu, Hawaii, metropolitan area. As described below, Route TH-3 is necessary both to serve the growing civilian traffic between the leeward and windward coasts of Oahu and to provide direct access between the important military installations on the two sides of the Island. A map showing the location of the proposed route in relation to the City of Honolulu and the major military facilities in the area appears on the facing page.

When the initial decision to construct TH-3 was reached in the early 1960's, the highway was to be routed through a populated area some distance from its presently proposed site. However, public hearings resulted in widespread support to relocate the highway from its then-proposed site to the Moanalua Valley. The Moanalua Valley is a privately-owned tract which was, at the time this suit was commenced, closed to the public and which remains undeveloped except for high tension power transmission towers and lines and a rough trail leading to the lines. Routing the highway through the Moanalua Valley would avoid displacing residents and would prevent an increase in congestion on the already-overcrowded highways and public facilities over or near which the major alternative routes for

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[2] The highway was originally designated as H-3, which indicated that there were no mass-transit-only lanes proposed. As planning progressed, it was determined to include special mass transit lanes. As a result, the highway's designation was changed to TH-3.

TH-3 would have run. Accordingly, based upon the near-unanimous views of the public expressed at the hearings, the route of TH-3 was shifted to its present site through the Moanalua Valley, and construction was started on both ends of the project.

At this point a private group, acting without the approval of the owners of the Valley, applied to the Interior Department to have the Moanalua Valley designated an historic site of national importance and to the State of Hawaii to have the Valley designated an historic site of state or local importance. The same group also requested that a petroglyph rock located in the Valley be designated an historic object. Hawaii State officials did determine that the petroglyph rock was an object of historic significance. However, after review of the application, the Interior Department determined that the Valley itself had no national significance and the appropriate State officials concluded that the Valley had no state or local significance. But despite the findings of no state or local significance by the competent State officials, the Interior Department nonetheless later announced that it had found the Moanalua Valley to be of *local* historic significance.

In his review and approval of the construction of TH-3, the Secretary of Transportation found Section 4(f) inapplicable to the Moanalua Valley because the responsible federal officials had found the Valley to be of no national significance and the responsible State of Hawaii officials had found it to be of no local significance. Thus, he did not make any determination as to whether he was in a position to make the special findings required by Section 4(f) as to a project coming within its scope. (App. 16a-17a) The

Secretary of Transportation did not consider the finding of the Interior Department as to the Valley's claimed local historical significance as one triggering the requirements of Section 4(f) because he concluded that the determination referred to in Section 4(f) as to state or local significance was one to be made by the state and local officials. While the petroglyph rock was clearly an object of local historical significance, the Secretary also apparently determined that Section 4(f) did not apply to the rock because it was an object, not "land from a site" within the meaning of the statute, and because it was undisturbed by the project.

The District Court agreed with the Secretary of Transportation's interpretation of Section 4(f), but a divided Court of Appeals reversed. According to the majority, the Interior Department has power under Section 4(f) to instruct state and local officials that particular sites are of local significance no matter what those officials may determine.

Section 4(f) was intended by Congress to allow state and local officials, who are uniquely well-situated to appreciate the local importance of historic and similar sites, to pass upon the significance of such sites, subject to review of the overall project by the Secretary of Transportation. Section 4(f) was not designed to delegate power to Department of Interior officials in Washington, who are particularly ill-positioned to understand the local significance of sites thousands of miles away, to overrule the findings of the competent state and local officials. Yet the two-judge majority does precisely that. Such a result ignores the plain language and legislative history of an important statute, is opposed to the holdings of other courts, and rides rough-

shod over the traditional federal-state relationships embodied by Congress in Section 4(f). For all these reasons, this case is appropriate for review by this Court.

STATEMENT OF THE CASE

A. Factual Background

1. *Need for TH-3.*—As shown by the map on page 4, TH-3 is to be constructed from Pearl Harbor in the Honolulu metropolitan area on the leeward side of Oahu to the windward side of the island near Kaneohe Marine Corps Air Station. Detailed planning for a leeward-windward highway has been underway for a number of years and the need for the road is well-established.[3] The windward side

[3] Planning for the highway started in 1960 when the National System of Interstate and Defense Highways was extended to Hawaii and initial approval of a leeward-windward interstate highway in the Honolulu area authorized by the Federal Highway Administration. (EIS 2-3) Then, in 1964, the City and County of Honolulu adopted the Oahu General Plan after an extensive economic and planning study participated in by federal, state, and local government agencies; private consultants; and interested civic organizations and private citizens. The General Plan, which is still in effect, is designed to guide development in the Honolulu metropolitan area. TH-3 was included as an important element both of the Plan itself and of the detailed land use map adopted in 1964 by the City and County to carry out the Plan. (EIS 1-2)

Meanwhile, in 1962, the State of Hawaii and the City and County of Honolulu authorized a comprehensive Oahu Transportation study to plan the future transportation network of Oahu, including both mass transit and highways. Participants in the study included representatives of the Federal Highway Administration, Department of Housing and Urban Development, State of Hawaii, and City and County of Honolulu; technical and citizens advisory committees; and expert consultants in various fields. The resulting three volume study and transportation plan, issued in 1967, designated TH-3 as an integral part of the Oahu transportation network. (EIS 8-9)

of Oahu is one of the fastest growing areas in the State of Hawaii. Its population increased 51% between 1960 and 1970, and a similar increase is projected for the next twenty years. (EIS 13)[4] Traffic counts and projections for the years 1976 through 1990 show that the two existing roads are barely adequate to handle present civilian traffic and that new road facilities must be constructed in the near future between the Honolulu metropolitan area and windward Oahu. (EIS 12-14) Morever, there is no present road directly connecting Pearl Harbor with the important military installations on the windward side of Oahu.

2. *Location of TH-3 Through the Moanalua Valley in Response to Citizen Requests.*—Five separate routes from the Honolulu area to the windward side of Oahu were given serious consideration during the initial planning phase of TH-3. The State of Hawaii and other planners favored constructing the highway near the present Likelike highway. However, a number of public hearings were held on the highway project in 1965 and the comments of other government agencies, civic organizations, environmental groups, and private citizens overwhelmingly favored routing TH-3 through the Moanalua Valley, because this would minimize dislocation of residences, would not increase usage of existing public facilities and highways, and would open up the previously inaccessible valley.

Among those favoring realignment were the Commanding General, Headquarters, U.S. Army, Hawaii, who believed that the Moanalua Valley route would be the most useful

[4] "EIS" refers to the six volume final Environmental Impact Statement issued by the Federal Highway Administration on August 8, 1972.

in case of military emergency; the Board of Water Supply, which considered that the Moanalua Valley route would best guard against contamination of the water table; and the Outdoor Circle, a Hawaiian environmental group. (EIS 3-7) As a result of these comments, the highway planners agreed to relocate the route of TH-3. Accordingly, in 1967 TH-3 was officially realigned through the Moanalua Valley along a route initially suggested by the Outdoor Circle and concurred in by the U.S. Armed Forces. (EIS 7)

3. *The Moanalua Valley.*—The Moanalua Valley is in private hands and is now administered by the Trustees of the estate of the deceased owner. When the route for TH-3 was chosen, the Valley was largely overrun with second growth plantings and undeveloped except for the Hawaiian Electric Company's high tension power lines and transmission towers and a rough maintenance trail. The Valley was barred to the public by a locked gate. (EIS 26-27)

At the time the plans for TH-3 were made final, the Trustees were considering redeveloping the Moanalua Valley as a private garden to be accessible to the public and for that reason had commissioned a number of scientific studies of the Valley. The studies concluded that, while the Valley could be redeveloped into an attractive garden area, its botany, wildlife and archaeology, with the exception of the petroglyph rock mentioned above, were of no particular significance. (EIS 33-34; Ex. 5-5 and 7-1)[5] When the highway route was chosen, the Trustees and transportation planners met and agreed on a number of steps to as-

[5] "Ex." refers to exhibits introduced by the parties at the trial and submitted as Appendices to the Court of Appeals.

sure the compatibility of TH-3 and the proposed gardens, as follows:

(a) *Access to Gardens.* At the Trustees' request, the plans for TH-3 were revised so that the highway could serve as the access to the proposed gardens. Thus, the State agreed to construct vehicle access and cross-over routes in the Valley so that visitors from both leeward and windward Oahu could park in the Valley to visit the proposed gardens. The Trustees, in turn, agreed to construct paths from the parking areas so that visitors could visit the redeveloped garden areas. (EIS 29-31)

(b) *Protection of Petroglyph Rock.* The highway planners and the Trustees also considered the best means of safeguarding the petroglyph rock. The rock, which contains prehistoric drawings of local value, had been inaccessible to the public. The Trustees and the State agreed that the State would divert slightly the course of the Moanalua stream, which threatens to inundate the rock in times of flood. The State also agreed to screen the highway, which will be nearly 200 feet from the rock, by mature plantings. The Trustees agreed to develop the rock site as an exhibit area accessible to the public. (EIS 63-64; Ex. 7-18, p. 4) According to the Advisory Council on Historic Preservation, this agreement would adequately protect the rock from any potential impact from the construction of the highway. (Ex. 7-18)

Based upon the foregoing understandings, the Trustees agreed to the acquisition by the State of the portions of the Valley needed for TH-3. (EIS 29-30)

4. *Requests for Historic Status for Moanalua Valley.* On June 7, 1971, the Hawaii Historic Places Review Board

considered and rejected the idea of nominating the Moanalua Valley to the Secretary of Interior's National Register[6] of historic sites and objects because of the marginal character of the Valley's archaeological remains and the dubious nature of the only historical claims.[7] Thereafter, the Moanalua Gardens Foundation, a private group which had neither official status nor any ownership interest in the Valley, made a series of requests seeking historic status for all or part of the Moanalua Valley, with the following results:

(a) *National Significance of Valley Rejected by Interior and Landmark Status Denied.* In March, 1973, the Foundation submitted an application to the Department of Interior to have the Valley made a National Historic Landmark, and sent a copy of its request to the Hawaii Historic Places Review Board. Studies were then undertaken by a state professional team composed of historians and archaeologists and by the National Park Service Office of Archaeology

[6] The National Historic Preservation Act of 1966 ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, authorizes the Secretary of the Interior to maintain a National Register of historic sites, buildings, objects, and the like, of national, state or local significance, and established the Advisory Council on Historic Preservation to consult with federal agencies before agencies could impair National Register properties. Under the NHPA, each state appoints an Historic Preservation Officer whose responsibility it is to recommend appropriate sites, objects, etc., to the Secretary of Interior for enrollment on the Register. For Hawaii, the Historic Preservation Officer at the time of the filing of this suit was the Chairman of the Board of Land and Natural Resources, who acts upon the recommendation of the Hawaii Historic Places Review Board. Hawaii Rev. Stat. §§ 6-16.1, 6-16.2(11).

[7] These were based upon "oral traditions" recorded earlier this century by a former owner of the Valley. These "traditions" had never been examined by scholars and upon examination did not withstand professional scrutiny. (Ex. 7-10, 7-17)

and History. The State group concluded that the application was unjustified, and indeed the Park Service concluded that "it would not be possible . . . to professionally defend" a grant of the application. (Ex. 7-10) Accordingly, on October 3, 1973, the Interior Department's Board on National Parks and Historic Sites, Buildings, and Monuments, found that the Valley was not of national significance and recommended rejection of the application. (Ex. 7-1; *see also* Ex. 7-4)

(b) *State and Local Significance of Valley Rejected by Hawaii, and National Register Nomination Denied.* On November 19, 1973, the Foundation asked the Hawaii Historic Places Review Board to consider once again nominating the entire Valley to the National Register. Ultimately, on August 4, 1974, the Board found that the "historical" information submitted by the Foundation was "insubstantial," "deficien[t]," and "inaccura[te]." The Board determined that the Moanalua Valley was of no state or local significance as an historic site. (Ex. 5-5; 7-10)

(c) *Local Significance Found by Interior and Valley Found Eligible for Register.* Meanwhile in July, 1973, the Foundation had also attempted to nominate the Valley for National Register status directly by filing an application with the Interior Department. This procedure was rather irregular, since normally such nominations are made by the State Historic Preservation Officer.[8] Thereafter, on May 8, 1974, the Secretary of Interior issued a determination that the Valley "may be eligible" for inclusion on the National Register. 39 Fed. Reg. 16175, 16176. The Secretary admitted that the Valley was not of national sig-

[8] *See* Ex. 5-9 (National Park Service Form 10-300 (July, 1969)) and App. 23a, n.2.

nificance but contended that it had *local* significance. (Ex. 7-14)[9]

(d) *Hawaii Nominates and Interior Enrolls Petroglyph Rock on National Register.* Also at the request of the Foundation, in early 1973 the Hawaii Historic Places Review Board recommended, and the Hawaii Historic Preservation Officer nominated, the petroglyph rock for inclusion on the National Register as an historic object. On July 23, 1973, the petroglyph rock was placed on the National Register. 39 Fed. Reg. 6402, 6422.

5. *Decision of the Secretary of Transportation.* Based upon the above-described facts, the Secretary of Transportation concluded that the provisions of Section 4(f) were not applicable either to the Moanalua Valley or to the petroglyph rock and that construction of the highway could proceed. (App. 8a) It appears that the Secretary relied upon the following analysis to reach his conclusions:

(a) *Moanalua Valley.* The Valley had been found to be of no national significance by the Interior Department and of no state or local significance by the Hawaii authorities. Section 4(f) applies only to historic sites determined to be of "national, state, or local significance as so determined by" "the federal, state, or local officials having jurisdiction thereof." (See p. 3, *supra*) Since, under the statute, federal officials are to make findings as to national significance and state and local officials are to make findings

[9] Whatever the significance of this finding, the Secretary of the Interior did not then and never has either nominated or placed the Moanalua Valley on the National Register. Supplemental Memorandum of Federal appellees, filed with the Court of Appeals on October 22, 1975. In any event, the question is not as to the Secretary of the Interior's power under the NHPA but as to the proper construction of Section 4(f).

of state and local significance, based upon the negative findings of these officials as to the matters within their respective competence, the Valley was simply not within the statutory coverage. The indication of "local significance" by the Secretary of Interior, even if correct, was irrelevant because the Secretary of Interior had no authority or "jurisdiction" to make a determination of local significance for the purposes of Section 4(f).

(b) *Petroglyph Rock.* The petroglyph rock was subject to an agreement which the Advisory Council on Historic Preservation had found would "satisfactorily" protect the rock in its present location. Moreover, the rock is an object, as its nomination to the National Register specifies. Since Section 4(f) applies to the "use" of "land" from a "site" for highway programs, its provisions are inapplicable to the petroglyph rock both because the rock is not "land" or a "site" and because it is not being "used" in the project.

B. Proceedings Below

1. *The Decision of the District Court.*—The present litigation consists of two suits, filed July 19, 1972, and April 9, 1973, by certain organizations and individuals opposed to the construction of a leeward-windward interstate highway, and consolidated by the District Court. The consolidated complaint raised no fewer than eighteen separate contentions as to why construction of TH-3 should be enjoined.[10] Commencing on December 3, 1974 the District

[10] In addition to those at issue in this Petition, these contentions included numerous alleged inadequacies in the Environmental Impact Statement; various claimed violations of the Federal-Aid Highway Act; a number of asserted inconsistencies with the Clean Air Act and the National Historic Preservation Act; and an alleged failure to comply with the Honolulu City charter. (App. 39a)

Court held a trial on the merits and rejected all the arguments raised by the plaintiffs. (App. 34a-64a)

With specific reference to the Section 4(f) issues involved in this Petition, the District Court held as follows. First, Section 4(f) does not apply to the Moanalua Valley because the Secretary of Interior has determined it is of no national historic value and State of Hawaii officials determined it was of no state or local historic value. (App. 59a-60a) Second, Section 4(f) does not apply to the petroglyph rock because its particular site is of no significance and a satisfactory agreement has been made limiting the effect of the highway on the rock. (App. 58a-59a)

2. *The Decision of the Court of Appeals.*—The Court of Appeals reversed the District Court by a vote of two to one, holding that the provisions of Section 4(f) apply to both the Moanalua Valley itself and to the petroglyph rock.

As to the Valley itself, the majority seized on the grammar of Section 4(f), observing that the provision's "language" was "disjunctive" and that the term "officials" was plural.[11] (App. 10a-11a, 12a n.15) It then held that if *any* of the officials at whatever level in the federal system—local, state or national—made an affirmative determination as to *either* the national, state or local significance of a site, it was conclusive for purposes of Section 4(f). The majority thus concluded that the Secretary of Interior's finding of local historical significance brought into play the provisions of Section 4(f) as to the Valley notwithstanding that the

[11] The statute applies to "any land from a historic site of national, state, or local significance as so determined by" "the federal, state, or local officials having jurisdiction thereof." *See* p. 3, *supra*.

authorized state and local officials had found the Valley of no state or local historical significance. (App. 10a-11a) The majority did not concern itself with the obvious implication of its holding that local or state officials could make a binding decision that a site had *national* historical significance.

The Court of Appeals majority also found that the provisions of Section 4(f) apply to the petroglyph rock. The majority believed that because the rock was originally located in the Valley—even though it had been moved from its original location—it "forms the basis for a historic site" which will be "use[d]" by the passage of the highway some 200 feet from the rock. (App. 17a)

Circuit Judge Wallace dissented on both issues. With respect to the Moanalua Valley, Judge Wallace found that only state or local officials had power to determine the local significance of an alleged historic site for purposes of Section 4(f). (App. 27a-29a) In reaching this conclusion, he relied upon the well-established canon of construction that parallel modifying terms ("federal, state, or local officials") apply distributively to parallel modified terms ("national, state, or local significance"). Thus, federal officials determine national significance; state officials determine state significance; and local officials determine local significance. (App. 28a) Since the Interior Department found the Valley of no national significance and the state and local officials having authority over the Valley determined that it had no state or local significance, Section 4(f) did not apply. (App. 27a-28a)[12]

[12] Judge Wallace disputed the authority of the Secretary of the Interior to put the Valley on the National Register, holding that "a reasonable interpretation of all the available sources indicates

With respect to the petroglyph rock, Judge Wallace indicated that since the significance of the rock is primarily as an object of viewing and study, which would be facilitated by construction of the highway, it did not appear that the project would "use" the rock within the meaning of Section 4(f). However, Judge Wallace believed that the District Court's findings on this issue were not adequate and for that reason he would have remanded the case for further findings. (App. 30a)

REASONS FOR GRANTING THE WRIT

Although the precise legal issue here is one of first impression for this Court, the case presents another example of the improper interference with the delicate balance between federal and state relations which has occupied this Court's attention on a number of recent occasions. *National League of Cities* v. *Usery,* 96 S. Ct. 2465 (1976); *Rizzo* v. *Goode,* 96 S. Ct. 598 (1976). In this particular instance, a site concededly of no national historic value has been found by a federal official to be of local significance despite the fact that the appropriate state and local officials made a determination that it had had no local significance. Consequently, contrary to the plans adopted as the result of near-unanimous recommendation by officials and citizens

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that properties of state and local historic significance are not to be listed by the Secretary of the Interior unilaterally without an initial determination of significance by state officials." (App. 20a) However, Judge Wallace further concluded that even if the Secretary of the Interior had "the authority unilaterally to determine a site's local historic significance" for purposes of NHPA, as to local significance he would not be one of the officials having jurisdiction within the meaning of Section 4(f). (App. 25a) The essential issue presented by this Petition, of course, has to do with the construction of Section 4(f), not with the construction of the NHPA.

of Hawaii at a public hearing, and contrary to the intent and purpose of Section 4(f), the construction of Route TH-3 will be delayed or halted.

The result is corrosive to our federal system; it permits a federal official—the Secretary of the Interior—not charged with the administration of the federally-assisted highway program to make a decision having to do with purely local or state historical significance, and to contradict the determinations of the local and state officials that no local or state historical significance exists. Thus, even though the local and state officials have found that there is no local and state historical significance and the federal official charged with the project's administration—the Secretary of Transportation—has determined that it should go forward, the project is halted. The result would be bizarre even if it were mandated by the statute; to reach it through the Court of Appeals' strained construction of the statute is to create a situation necessitating this Court's review.

1. *Section 4(f) Does Not Apply to the Moanalua Valley.*—In reaching the conclusion that Section 4(f) applied to the Moanalua Valley, the two-judge majority of the Court of Appeals erred in a number of respects.

First, the construction given to Section 4(f) by the majority does violence to long-accepted, indeed black-letter, canons of statutory construction:

> "Where a sentence contains several antecedents and several consequents they are to be read distributively. That is, the words are to be applied to the subjects to which they appear by context most properly to relate and to which they are most applicable." 2A Sutherland, Statutory Construction § 47.26 (4th ed. 1973).

This principle has been applied in the federal courts at least since *United States* v. *Simms,* 5 U.S. (1 Cranch) 251, 258 (1803) (Marshall, C.J.). *See also United States* v. *Pritchett,* 470 F.2d 455 (D.C. Cir. 1972); *Mutual Federal Savings and Loan Ass'n* v. *Savings and Loan Advisory Committee,* 38 Wis. 2d 381, 157 N.W.2d 609 (1968). This principle is but a specific application of the general rule that an Act of Congress is not simply to be read as a collection of English words. *See, e.g., Richards* v. *United States,* 369 U.S. 1, 11 (1962); *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285 (1956).

Section 4(f) applies to historic sites of "national, state, or local significance" as determined by "federal, state, or local officials." Thus, under the statute, federal officials determine national significance; state officials determine state significance; and local officials determine local significance. A grammarian parsing a sentence in a vacuum might fasten upon the "disjunctive language" of the sentence and read all the subjects with all the predicates the way the majority of the Court of Appeals did. But under the accepted canons of statutory construction—which are based on the practicalities of interpreting statutory commands—and where, as here, the judiciary is charged with interpreting these commands in a manner becoming to a federal system, such a result is not appropriate. The drily verbal conclusion reached below not only improperly allows federal officials to instruct state and local officials as to matters of local concern, but leads to the bizarre situation in which local officials are entitled to determine that a site is of national significance.

Second, the decision of the two-judge majority ignores or misreads the legislative history of Section 4(f). Prior

to the enactment of the present Section 4(f) in 1968, the statute was vague as to how the determination would be made as to whether a site was of state or local historical value; indeed, the text of the statute did not focus at all upon the question of state or local, as opposed to national, historical significance.[1] The 1968 amendments were intended to allow state and local officials to make determinations as to state and local historical significance, reserving, of course, to the Secretary of Transportation the ultimate authority to determine whether the federally-funded project should go forward. 23 U.S.C. §§ 103(f), 105(a), 106(a), 109, and 138.

For example, Senator Randolph, the leader of the Senate Conferees, explained that a major purpose of the amendments was to grant authority to state and local officials to pass upon the local significance of a project:

> "I insisted that we must realize that the determination of the local people must be considered. I join my colleague in his feeling that it is important that local people have a leadership. They can properly understand the importance of places that someone from afar may not realize. The importance of such places can only be understood by local people." 114 Cong. Rec. 24029 (1968).

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Furthermore, in response to questions from Senators who were concerned that state or local officials would make improper findings of no significance in order to exempt park, historic, or other such areas from the coverage of

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[1] Prior to 1968, Section 4(f) provided, in relevant part, that "The Secretary [of Transportation] shall not approve any program which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historical site unless . . . ." 80 Stat. 934.

Section 4(f), Senator Randolph stated on three separate occasions that any such possible abuse would be prevented by review of state or local determinations by the Secretary of Transportation. The Secretary of Transportation's authority is his overall authority in this regard with respect to a federally-funded project:[2]

"MR. JACKSON: My understanding is, in connection with the amendments that have been made to Section 4(f) . . . , that even though the local authorities—meaning the State or authorities or subdivision in a State—should decide the highway would not violate the recreational area or the public park area, the Secretary [of Transportation] nevertheless would retain the right to veto the action. Would the Senator from West Virginia . . . respond to that?

"MR. RANDOLPH: The Senator is correct. That is retained in the Secretary's authority." 114 Cong. Rec. 24032 (1968).

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"[MR. YARBOROUGH]: . . . The question has been raised that, if the local authorities said that a site had no historic significance, engineers could ram a highway through regardless of a site's being of historic significance. Is that correct?

[2] 23 U.S.C. §§ 103(f), 105(a), 106(a), 109, and 138.

"MR. RANDOLPH: No; they could not ram it through as the Senator has said.

"MR. YARBOROUGH: Do the Secretary of Transportation and the highway officials of the federal government have the power to apply this provision of the bill as written even though the local officials say such site has no significance?

"MR. RANDOLPH: Under their power to approve plans, specifications, and estimates, they can review such decisions." 114 Cong. Rec. 24036-37 (1968).

• • •

"MR. RANDOLPH: I would especially remind the Senator from Texas [Mr. Yarborough] that, under any circumstances, the Secretary of Transportation does not have to accept the local . . . [determination that lands of the type with which Section 4(f) deals are of no significance]. He has authority under the provisions of title 23 to exercise his independent judgment . . . ." 114 Cong. Rec. 24029 (1968).

The majority of the Court of Appeals seized upon this passage as a proof, as it put it, that "the *Federal* power is transcendent." (App. 13a n.15) And so it is, in the sense that the Secretary of Transportation is the master as to whether the project will go forward on a federally-funded basis. But there is nothing whatsoever to indicate that the Secretary of the Interior—or any other federal official—was to be given authority to make determinations of issues of state or local historical significance. Rather, the legislative history is clear that the congressional intent in enacting Section 4(f) was to grant state and local officials power

to make those decisions, subject to the Secretary of Transportation's overall power of review of the project.

Third, the majority's interpretation of the statute is at odds with the decisions of two other Federal courts which have considered the matter. In *Manning* v. *Brinegar,* C.A. No. 74-532 (D.S.C., May 9, 1974), the question at issue was who is empowered to determine whether an alleged historic site is of state or local significance for the purposes of Section 4(f). The District Court there held that "there must be a determination by the proper state or local officials that the land in question is indeed a historic site of state or local significance" before the provisions of Section 4(f) are applicable. Op., p. 14. Similarly, in *Harrisburg Coalition Against Ruining the Environment* v. *Volpe,* 330 F. Supp. 918 (M.D. Pa. 1971), the District Court held that a determination of the state and local officials as to the local significance of a site under Section 4(f) was only subject to project review by the Secretary of Transportation.[3] 330 F. Supp. at 929.

2. *The Misapplication of Section 4(f) to the Petroglyph Rock.*—With respect to the petroglyph rock, the issue presented to this Court is largely one of first impression. Section 4(f) was designed to protect lands available for public enjoyment from being "used" for construction projects. To that end, it covers parks, recreation areas, wildlife refuges, and "land from an historic site." The petroglyph rock is plainly not "land" or a "site" at all; it is an object and is

[3] *See also Pennsylvania Environmental Council, Inc.* v. *Bartlett,* 454 F.2d 613 (3d Cir. 1971). In *Bartlett* the issue was whether the finding of a state official that certain lands were not a public park, recreation area, or historic site was to be followed by the Secretary of Transportation. The Court of Appeals held that where the appropriate state official had found that a particular state-owned property was not an historic site, his ruling was to be accepted.

listed on the National Register as such. As described above, all the authorities who examined the rock concluded that while the rock itself has significance, its present location does not. Accordingly, by its plain language, Section 4(f) does not apply to the petroglyph rock.

Furthermore, the construction of the leeward-windward highway nearly 200 feet from the rock does not "use" the rock in any sense of the word. The rock will be screened from the highway by trees and unaffected by the project except insofar as the highway will make the rock freely accessible to the public for the first time. The Advisory Council on Historic Preservation has found that the rock will be adequately protected in its current location. (Ex. 7-18) The two-judge majority's conclusion that, under these circumstances, the project would "use" the rock is both incorrect and diametrically opposed to the decision of the Court of Appeals for the Eighth Circuit in *ACORN* v. *Brinegar,* 398 F. Supp. 685 (E.D. Ark. 1975), *aff'd on basis of opinion below,* 531 F.2d 864 (8th Cir. 1976). In *ACORN,* the courts held that construction of a highway immediately adjacent to a public park was not a constructive taking requiring the application of the provisions of Section 4(f). 308 F. Supp. at 692-94.

While the decision below as to the petroglyph rock does not present the affront to Federalism that the decision as to the Valley itself does, the issue clearly warrants this Court's consideration as an incident to its review of the issue as to the Valley.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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August, 1976

APPENDICES

APPENDIX A

Opinion of United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STOP H-3 ASSOCIATION, et al., and HUI MALAMA AINA O KO'OLAU, et al., *Appellants,* vs. WILLIAM T. COLEMAN, JR.,* as SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, et al., *Appellees.*	No. 75-1552 OPINION

[March 8, 1976]

Appeal from the United States District Court
for the District of Hawaii

Before: KOELSCH, ELY, and WALLACE, Circuit Judges.

ELY, Circuit Judge:

The Moanalua Valley, a beauteous natural wonder that many believe to be of great significance in Hawaiian history,[1] lies on

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*Originally, the Federal appellee was Claude S. Brinegar, then Secretary of Transportation. His successor has been substituted under the authority of Rule 43(c), Fed. R. App. P.

[1]According to the Advisory Council on Historic Preservation,

> The historical and cultural significance of the [Moanalua] [V]alley stems from Hawaiian folklore and tradition and continues into the 20th century. The valley contains Kamanui, the valley of the great power, and Waolani, the valley of the spirits which was, in tradition, "the dwelling place of the gods." The forest of the valley retains a traditional natural state associated with the legend and history of the area.
>
> The valley was the property of the royal house of Oahu, the scene of battles and other exploits which are extolled in the ancient Hawaiian chants, the Kahikilaulani. After King Kamehameha conquered the island of Oahu in 1796, the valley was the home of his supporters and eventually passed, in 1848, to his grandson, King

Hawaii's Island of Oahu, directly in the path of a proposed Interstate Highway called H-3. The principal issue on this appeal is whether Moanalua qualifies for protection as an "historic site of . . . State or local significance" under section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. § 1653(f) (1970), and section 18 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1970). (Both statutes, which are essentially identical, are hereinafter referred to simply as "section 4(f)".[2]) Relying on a published determination by the Secretary of the Interior that Moanalua is eligible for inclusion in the National Register of Historic Places, the appellants[3]

Kamehameha V, then to Princess Ruth Keelikolani in 1872, and, upon her death, to her cousin, Princess Bernice Pauhi Bishop who willed it, in 1883, to her friend, Samuel Mills Damon.

Advisory Council on Historic Preservation, *Comments* on an Undertaking by the Federal Highway Administration Having an Effect upon Pohaku ka Luahine and Moanalua Valley, Oahu, Hawaii (August 7-8, 1974) (hereinafter referred to as "Advisory Council, *Comments*").

[2]Section 4(f) states:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. § 1653(f) (1970).

[3]The appellants are the Stop H-3 Ass'n, the Moanalua Valley Community Ass'n, the Kaiku Village Community Ass'n, Life of the Land, the Moanalua Garden Foundation, all of which are non-profit organizations chartered for the purposes of opposing the construction of H-3 or preserving the Moanalua Valley, and several named individuals.

The National Wildlife Federation has filed a brief as *amicus curiae*, supporting the appellants.

contend that section 4(f) applies. The appellees,[4] who rely primarily on a determination by Hawaii State officials that Moanalua is only of "marginal" historic significance, argue that section 4(f) is inapplicable to the routing of H-3 through the Valley. Agreeing with the appellees, the District Court dissolved the injunctions that it had previously entered against construction of the highway.[5] *Stop H-3 Ass'n v. Brinegar*, 389 F. Supp. 1102 (D. Hawaii 1974). We reverse.

I. *Statutory Background*

Public interest in preservation of the physical reminders of our Nation's past has prompted Congress to implement a strong national policy in favor of historic preservation. *See* 16 U.S.C. §§ 461, 470; 23 U.S.C. § 138; 49 U.S.C. § 1653(f) (1970). In section 4(f), Congress has determined that historic preservation should be given major consideration in connection with all proposed highway construction programs that are to receive financial aid from the federal government. The statute provides, in declaring national policy, that ". . . special effort should be made to preserve . . . historic sites." The statute further provides that before the Secretary of Transportation [hereinafter "the Secretary"] may approve the use of Federal funds for a highway that will "use" land from ". . . an historic site of national, State, or local significance as so determined by [the Federal, State, or local officials having jurisdiction thereof]," he must determine that no "feasible and prudent" alternative route exists. If there is no "feasible and prudent" alternative, the Secretary may approve the project only if there has been ". . .

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[4]Appellees are the Secretary of Transportation, the Hawaii Division Engineer for the Federal Highway Administration, and the Director of the Department of Transportation of the State of Hawaii.

[5]The prolonged history of the present controversy in the District Court is thoroughly and carefully reviewed in the District Court's Opinion. *Stop H-3 Ass'n v. Brinegar*, 389 F. Supp. 1102, 1105-07 (D. Hawaii 1974).

We have hitherto issued an injunction designed, pending the disposition of this appeal, to prevent irreversible damage or destruction of the natural environment involved in the controversy. That injunction will remain in effect pending the eventual disposition of the appeal and the issuance of a new injunction by the District Court in conformity with our conclusion.

all possible planning to minimize harm . . ." to the historic site. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411-13 (1971). The requirements are stringent. Congress clearly reflected its intent that there shall no longer be reckless, ill-considered, wanton desecration of natural sites significantly related to our country's heritage.

As one step toward implementing the national policy in furtherance of historic preservation, Congress, in the National Historic Preservation Act of 1966 [hereinafter "the NHPA"], 16 U.S.C. §§ 470 et seq. (1970), authorized the Secretary of the Interior

> to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register . . . .

16 U.S.C. § 470a(a)(1) (1970). The National Register, which includes properties of State and local, as well as national, historic significance, is intended to provide a ". . . convenient guide to properties which should be preserved . . . ." H.R. Rep. No. 1916, 89th Cong., 2d Sess., reproduced at 1966 U.S. Code Cong. & Admin. News 3307, 3310. In the NHPA, Congress also created the Advisory Council on Historic Preservation [hereinafter "the Advisory Council"], which is composed of the head officials of certain Federal agencies and other persons, appointed by the President, who have experience and interests in the field of historic preservation. 16 U.S.C. § 470i (1970). The Advisory Council is responsible for coordinating the historic preservation efforts of Federal agencies, state governments, and other organizations, and for making recommendations on matters pertaining to the protection and preservation of historic sites. 16 U.S.C. § 470j (1970).

To facilitate the identification of properties of State and local historic significance that qualify for inclusion in the National Register, the Secretary of the Interior has established certain "National Register Criteria." These Criteria broadly provide, in pertinent part, as follows:

> The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects of State and local importance

> that possess integrity of location, design, setting, materials, workmanship, feeling and association and:
>
> (1) That are associated with events that have made a significant contribution to the broad patterns of our history; or
>
> (2) That are associated with the lives of persons significant in our past; or
>
> (3) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
>
> (4) That have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 800.10 (1975).

As defined in 36 C.F.R. § 800.3(f) (1975), the phrase "property eligible for inclusion in the National Register" means "any district, site, building, structure, or object which the Secretary of the Interior determines is likely to meet the National Register Criteria." For the purposes of NHPA, the regulations place property that is eligible for inclusion in the National Register on an equal footing with property that is actually listed in the Register. *See* 36 C.F.R. §§ 800.4(a)-(b) (1975).

II. *The Factual Setting*

As planned, H-3 would constitute the third and final segment of Hawaii's Interstate Highway System. It would be a six-lane, controlled-access highway extending for approximately fifteen miles across the southern half of Oahu, from near Pearl Harbor, on the Island's leeward side, across the Koolau Mountains, to the Kaneohe Marine Corps Air Station, on the windward side. Two conventional highways, the Pali and Likelike Highways, now provide trans-Koolau routes, but according to some official projections, these highways will soon be inadequate to serve the growing population on Oahu's windward side. The Moanalua Valley, which is privately owned, lies within Oahu's interior. H-3's projected route extends for approximately three miles along Moanalua's narrow floor. Within Moanalua, H-3 would pass

from within 100 to 200 feet of a large petroglyph rock that is known as Pohaku ka Luahine.[6]

In March, 1973, the Moanalua Gardens Foundation, a private, non-profit organization that is interested in Moanalua's preservation, nominated both the Valley and Pohaku ka Luahine for inclusion in the National Register. On July 23, 1973, the Interior Secretary named Pohaku ka Luahine to the National Register. 39 Fed. Reg. 6402, 6422 (1974). In October of 1973, the Interior Secretary's Advisory Board on National Parks, Historic Sites, Buildings and Monuments considered the historic significance of Moanalua Valley. The Board noted that much of the information concerning Moanalua's importance existed only within the private notebooks of oral traditions about the Valley that had been kept by the Valley's former owner, Gertrude Damon, and that since the Damon notebooks had never been released by the Damon estate, they had never been subjected to rigorous scrutiny. Consequently, while the Board believed that Moanalua had not been conclusively demonstrated to be of national historic significance, it concluded that "[h]istorical, cultural, and natural values combined with outstanding potential for an environmental study area endow Moanalua Valley with an importance that makes its preservation clearly in the public interest."[7]

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[6]The Advisory Council states that

> Pohaku ka Luahine, a large boulder marked with petroglyphs, is located in the center of Moanalua Valley . . . . Pohaku ka Luahine is the largest free-standing petroglyph boulder on the island of Oahu and measures some 11′ x 8′ x 6′. There are only ten known petroglyph sites on the island of Oahu and only three such free-standing petroglyph boulders in the entire State.
>
> The rock shows 22 carvings which have been identified as petroglyphs (rock carvings) of human figures and bird men which range in sizes up to approximately 20 inches. All these were carved or pecked into the boulder surface with crude stone tools and endless hours of labor. The rock carving is described by the State Historic Preservation Officer as a "superb artistic expression of form in a medium of hard rock, using the crudest of tools and an unknown duration of labor . . . reason enough for ensuring the preservation of Pohaku ka Luahine." the ancient Hawaiians believed that natural phenomena—both animate and inanimate—possess spiritual form and being. In tradition, the rock is sacred.

Advisory Council, *Comments, supra* note 1.

[7]United States Department of the Interior, Memorandum from the Chairman, Advisory Bd. on Nat'l Parks, Historic Sites, Bldgs. & Monuments, to the Secretary of the Interior, October 3, 1973.

On May 8, 1974, the Interior Secretary published a Notice in the *Federal Register* that Moanalua, along with a number of other properties,

> may be eligible for inclusion in the National Register of Historic Places and are therefore entitled to protection under section 1(3) and section 2(b) of Executive Order 11593 and other applicable Federal legislation.

39 Fed. Reg. 16175-76 (1974).[8] Explaining his decision, then Interior Secretary Morton wrote in a letter to the Governor of Hawaii that while Moanalua was not of national historic significance, the Valley "possessed historical and cultural values of at least local dimensions and, therefore, could meet the less stringent criteria of the National Register for sites of local significance."[9]

Thereafter, however, on August 5, 1974, the Hawaii Historic Places Review Board, a State body responsible for evaluating and nominating Hawaiian properties for inclusion in the National Register and for maintaining the Hawaii Register of Historic Places,[10] met concerning Moanalua and determined that the Valley was only of "marginal" local significance,[11] a classification that affords the Valley no protection from destruction.

Since Pohaku ka Luahine had already been named to the National Register, the Federal Highway Administrator, in compliance with 36 C.F.R. § 800.4 (1975), requested the Advisory

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[8]Section 1(3) of Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971), 16 U.S.C. § 470 (Supp. I, 1971), requires Federal agencies to establish procedures for the protection and enhancement of non-federally owned historic sites. Section 2(b) of the Order pertains only to historic sites located on federally-owned land.

[9]Letter from Rogers C. B. Morton, Secretary of the Interior, to Governor Burns of Hawaii, May 13, 1974.

[10]Hawaii Rev. Stat. §§ 6-16.1, 6-16.2(11)(g) (1974 Supp.).

[11]The State's review board acted on the basis of a motion from one of its members that, in view of "deficiencies and apparent inaccuracies in historical information" and "inconsistencies in legendary material that has been presented," the Moanalua Valley "be given a marginal status." The same member stated that his motion would not preclude the later submission of additional information that might qualify the Valley for a higher classification. Minutes of the Meeting of the Hawaii Historic Places Review Board, August 5, 1974.

Council on Historic Preservation to comment concerning H-3's potential impact on the petroglyph rock. The Advisory Council met on August 6th and 7th, 1974. Because the Interior Secretary had recently determined that Moanalua was eligible for inclusion in the National Register, the Council broadened its review of H-3 from that requested by the Federal Highway Administrator to include the highway's potential impact on the Valley. The Advisory Council's report, copies of which were furnished to the Secretary of Transportation and to the Secretary of the Interior, concluded that both Pohaku ka Luahine and the Moanalua Valley possessed "historical, cultural, and archeological significance warranting their preservation."

Notwithstanding the Advisory Council's report and the Interior Secretary's published determination that Moanalua "may be eligible" for inclusion in the National Register, the Secretary of Transportation concluded, in September of 1974, that ". . . the Valley does not come under the provisions of Section 4(f)."[12]

III. *Discussion*

The District Court did not dispute the significance attached by the regulations to property that is eligible for inclusion in the National Register. The court wrote:

> [D]etermination by the secretary of interior that a property is eligible for inclusion in the National Register triggers all protections given to a property actually included until the eligibility is resolved.

389 F. Supp. at 1117. The court believed, however, that the Interior Secretary's May 8, 1974, *Federal Register* Notice, which stated that Moanalua "may be eligible" for inclusion in the Register, was not equivalent to a determination that the Valley "is eligible." We cannot accept this purported distinction.

As noted above, the regulations define "eligible for inclusion" in the National Register as meaning "likely to meet the National Register Criteria." We are absolutely unable to perceive any

[12]United States Dept. of Transportation, Federal Highway Administration, Memorandum from the Associate Administrator for Right-of-Way and Environment to the Regional Federal Highway Administrator, San Francisco, September 19, 1974.

meaningful distinction between "may be eligible" and "is likely to meet the criteria" for inclusion in the National Register. Furthermore, in his *Federal Register* Notice, the Interior Secretary specifically stated that the "may be eligible" designation entitled the listed properties to protection under the relevant Executive Order and "other applicable Federal legislation." This is the same protection that is provided under an "is eligible" determination. Finally, subsequent to the District Court's decision in this case, the Interior Secretary has resolved any remaining doubts by publishing a new *Federal Register* Notice concerning Moanalua. This Notice specifically states that the Valley has been determined "to be eligible for inclusion in the National Register." 40 Fed. Reg. 23906-07 (1975).

The District Court also concluded, and the appellees here contend, that since the Interior Secretary specifically determined Moanalua not to be of *national* historic significance, the question whether the Valley is significant in State or local history should be resolved solely by the Hawaii Historic Places Review Board. As previously noted, that Board has classified the Valley as being of only "marginal" historic significance. In our view, the District Court and the appellees have misconstrued section 4(f).

Section 4(f) applies to all properties that "the Federal, State, or local officials having jurisdiction thereof" determine to be of "national, State, or local significance." Under the NHPA, the Interior Secretary's "jurisdiction" to determine historic significance is not limited to properties of national importance.[13] In

[13]"Jurisdiction means the right to say and the power to act; and, as between agencies of the government, jurisdiction is the power of that particular agency to administer and enforce the law." *Carroll Vocational Institute v. United States*, 211 F.2d 539, 540 (5th Cir.), *cert. denied*, 348 U.S. 833 (1954).

The NHPA authorizes the Secretary "to expand and maintain" the National Register, and the *only* requirement for a property's inclusion in the Register is that the property be "significant in *American* history, architecture, archeology, [or] culture." 16 U.S.C. Sec. 470a(a)(1) (emphasis added). The Act does not distinguish in any way between properties of "national" significance and those of "state or local" significance. There is nothing whatsoever in the Act or its legislative history to indicate that the Secretary may name some properties to the Register—those of importance in the history of a region, state, or locality—only after obtaining the concurrence of state and local authorities. For the purposes of the Register, properties of national, state, and local significance are treated

defining the National Register, the NHPA speaks in terms of properties "significant in American history, architecture, archeology, and culture," 16 U.S.C. § 470a(a)(1) (1970). To us, it appears beyond dispute that such significance can be found in properties that relate only to the history of a particular region, state, or locality. *See* 36 C.F.R. § 800.10 (1975); H.R. No. 1916, 89th Cong., 2d Sess. (1966) reproduced at 1966 U.S. Code Cong. & Admin. News 3307. Since the Interior Secretary is the only official authorized to name properties to the National Register, we have no doubt that he has "jurisdiction" to determine whether properties have state or local historic significance.

Under section 4(f)'s disjunctive language, if any of the officials having jurisdiction to determine that a site has national, State, or local historic significance, so decides then section 4(f) applies. Consequently, the Interior Secretary's determination that

equally. They all are deemed significant in *American* history, and they should be. If it should be held that the Interior Secretary has no power to determine that properties have state or local historic significance, there would, in our view, be a virtual nullification of the NHPA and Section 4(f). Only properties of "national" significance would have any lasting protection from destruction. Whenever a city or state preferred a Federally-funded highway to an historic site, the local body could simply declare the site insignificant. Such a holding would be without precedent and would completely defeat Congress's clear attempt to protect such properties by passing the NHPA and 4(f).

The Advisory Council's regulations, upon which the appellees have relied, undoubtedly support our interpretation of the Secretary's power under the NHPA. Those regulations require *Federal agency officials* to request opinions from the Interior Secretary concerning a property's eligibility for inclusion in the Register. The Secretary's opinion is then said to be conclusive. 36 C.F.R. Sec. 800.4 (1975). The regulations do not require the concurrence of a state or local preservation official before the Secretary may conclude that a property is eligible for the Register.

Further, in our view, there has been nothing irregular or precipitous about the Interior Secretary's decision concerning the Valley with which we are concerned. The Secretary acted on the basis of an application submitted by the Moanalua Gardens Foundation, on forms provided by the Secretary for the purpose of making such nominations, and upon the expert recommendations of the Advisory Board on National Parks, Historic Sites, Buildings and Monuments and the Advisory Council on Historic Preservation. Indeed, the Secretary's decision concerning the Valley followed essentially the same channels as did his determination concerning Pohaku ka Luahine, and not even the appellees have questioned the validity of the latter decision.

Moanalua is eligible for inclusion on the National Register as a site of local historic importance is not vitiated, and cannot be vitiated, by the State Review Board's finding that the Valley has only "marginal" significance. *See Named Individual Members v. Texas Highway Dept.*, 446 F.2d 1013, 1025-27 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972) (section 4(f) applicable even though city officials had determined that city-owned parkland was of "secondary" importance to the construction of a freeway).[14]

In our court, the appellees have advanced three additional arguments which, if correct, might serve to validate the Transportation Secretary's decision that section 4(f) does not apply to the Moanalua Valley. First, taking a position different from that adopted by the District Court, the appellees assert that, even though the Secretary of the Interior may have determined Moanalua to be eligible for inclusion in the National Register, that determination does not constitute a finding of Moanalua's "historic significance" for the purposes of section 4(f). Appellees argue that section 4(f)'s application is narrowly restricted to properties that are actually included in the National Register or perhaps a similar state or local compilation of historic sites. We

[14] *See also* Gray, *Section 4(f) of the Department of Transportation Act*, 32 Md. L. Rev. 327, 386 (1973).

Appellees contend that *Named Individual Members* is distinguishable from the instant appeal because there the city council did not find the park to be of *no* significance but only stated that the park was of "secondary" importance to the highway. We note that, somewhat similarly, the Hawaii Historic Places Review Board did not specifically find Moanalua to be of *no* historic significance. The Board classified the Valley as having "marginal" significance. *See* note 11 *supra*. As do the appellees here, the Highway Department in *Named Individual Members* argued that the local body's action constituted a finding of no significance. *Named Individual Members*, 446 F.2d at 1026.

Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613, 620-23 (3d Cir. 1971), presented a different issue. There, the question was whether certain forest lands, owned by the State of Pennsylvania, had ever been set aside by the State as parkland or for other public recreational uses. The court held that the Secretary of Transportation was entitled to rely on an opinion letter from the State's Attorney General which stated that the lands had not been set aside for such purposes.

disagree.[15] In our view, the Interior Secretary's determination that Moanalua "is likely to meet" the established National Register Criteria constitutes a finding that the Valley has historic

[15]Section 4(f) focuses on Federal, not state or local, activities. It forbids the Secretary of Transportation from approving the use of Federal funds for highway projects not meeting the section's requirements. The statute has no application to purely state or local construction efforts. Section 4(f) begins by requiring, as a matter of national policy, that special effort be made to preserve historic sites. In view of the section's focus and obvious purpose, we simply cannot believe that either the Transportation Secretary or our court can ignore or avoid the Interior Secretary's pronouncement concerning the Valley.

We have concluded that under section 4(f) the Interior Secretary undoubtedly had the power, or jurisdiction, to investigate Moanalua, and while he decided that the Valley was not significant in the evolution of our history as a Nation, he nevertheless concluded that the Valley was likely of importance in our history as a people (i.e., significant in *American* history) and consequently declared the property eligible for the Register. His finding, when fitted into the mold of section 4(f), constitutes a finding of state or local significance. Congress's use of the plural "officials" in section 4(f) supports our interpretation of the statute's meaning. If the statute had read "as so determined by the Federal, State, or local *official* having jurisdiction thereof," it could then be interpreted as meaning that only the appropriate state official could determine that a site has state significance, etc. That is not what the statute says.

The legislative history of section 4(f) indicates that Congress inserted the language in question into the statute in order to broaden the statute's applicability. There is no hint in either the committee reports or the floor debates that Congress was seeking, by using the language, to give state and local officials power to vitiate Federal determinations that parklands or historic sites are significant. One of Congress's objectives was to require the Transportation Secretary to apply the statute whenever state or local officials declare a property significant, regardless of what Federal officials might think of the site. Congress's other goal was to guard against the situation wherein state or local officials decide that they would rather have a highway than a park or historic site and consequently declare the property to be insignificant. It is inconceivable that Congress intended that a local agency, by action or inaction, could disempower the Federal government, in a situation involving Federal funds, from preserving a site of historical *American* significance.

In the Senate's floor debate on the conference report pertaining to 4(f), Senator Yarborough asked Senator Randolph, who chaired the conference committee, the very question that concerns us:

> [Senator Yarborough] The question has been raised that, if the local authorities said that a site had no historic significance, engineers could ram a highway through regardless of a site's being of historic significance. Is that correct?
>
> MR. RANDOLPH. No; they could not ram it through, as the Senator has said.
>
> MR. YARBOROUGH. Do the Secretary of Transportation and the highways officials of the Federal Government have the power to apply this provision of the bill as written even though the local officials say such a site has no significance?
>
> MR. RANDOLPH. Under their power to approve plans, specifications, and estimates they can review such decisions.
>
> • • •
>
> MR. YARBOROUGH. • • • If you run a highway through a long, slender park . . . you do not have to pay any tax money for right-of-way. Thus the city council, hard pressed for money, is seeking to run a highway right through the center of one of the best parks in the State.
>
> MR. RANDOLPH. We are not going to allow that. [Indicating that the *Federal* power is transcendent.]

114 Cong. Rec. 24036-37 (1968).

The only commentator to consider the question also agrees with our interpretation of section 4(f):

> Historic sites present special problems. Unlike the other protected lands they need not be publicly owned. When they are not publicly owned, no presumption of a determination of significance can arise from the fact of public maintenance since normally only publicly owned property is publicly maintained. It is, on the other hand, customary for historic sites to be designated as such by someone such as a local or state landmarks commission, or by the United States Department of the Interior. Any such designation is presumably equivalent to a determination of significance for purposes of section 4(f).
>
> The determination may be made by any of the local, state or federal officials who can claim to have "jurisdiction thereof." For these purposes "jurisdiction" may refer to more than merely political authority, although governing bodies having general jurisdiction over the land in question would be able to trigger the application of the last sentence of Section 4(f) by declaring their determination of the significance of land which they wish to protect. An agency which is authorized to decide that properties have historic importance may be regarded as having "jurisdiction" over determinations of historic significance. Some properties, for instance, are listed by the Secretary of the Interior in the National Register of Historic Places.[120] *It is inconceivable that a National Register property could be regarded as ineligible for protection under section 4(f),*

significance. A contrary conclusion would exalt form and ignore substance.

In making this argument, appellees rely on two paragraphs of a letter written by former Interior Secretary Morton concerning his determination that Moanalua is eligible for inclusion in the National Register. Secretary Morton wrote that his determination of Moanalua's eligibility for listing in the Register did not trigger the requirements of section 2(b) of Executive Order 11593 and that the Department of Transportation remained ". . . solely responsible for determining which provisions, if any, of the . . . Department of Transportation Act . . . are applicable" to H-3.[16] We do not interpret Secretary Morton's letter as broadly as do the appellees. Section 2(b) of Executive Order 11593 establishes special requirements for the protection of historic sites that are located on lands owned by the United States. Since Moanalua is privately owned, the section, under its own terms, does not apply. Furthermore, there is no question that, as Secretary Morton stated, the Secretary of Transportation, not the Secretary of the Interior, is responsible for making the initial determination whether section 4(f) applies to a particular highway project.[17] In making that determination, however, the

regardless of whether it was considered "significant" by the local or state governing bodies having political jurisdiction over the property. A similar triggering function may inhere in a local or state historic society, if it has official status to designate landmarks. It might also be found in a state parks or recreation commissioner with respect to local parks which he has the authority to classify for state purposes, although they may not be under his administrative control. (Emphasis added)

Gray, *Section 4(f) of the Department of Transportation Act,* 32 Md. L. Rev. 327, 386 (1973).

[16]Letter, *supra* note 9.

[17]Our interpretation of Secretary Morton's letter is supported by a subsequent letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to Acting Governor Ariyoshi of Hawaii. Secretary Reed's letter states, in pertinent part:

> As was explained in Secretary Morton's May 13 letter to Governor Burns, . . . our evaluation of the eligibility of Moanalua Valley for inclusion in the National Register was not made pursuant to Section 2(b) of Executive Order 11593, since the property is not in public ownership.
>
> • • •
>
> I would like to reiterate . . . that once we assist an agency in making an evaluation on a property, it is the agency's responsibility to assess its own legal obligations under Federal law. The Secretary of the Interior is not at liberty to exempt the Department of Transportation from that obligation.

Transportation Secretary must ascertain whether the project will use land from a site of historic significance, as determined by the Interior Secretary, or state or local historic preservation officials. Moreover, as here, the Transportation Secretary's decision is subject to judicial review.

Appellees next assert that the Interior Secretary's determination that Moanalua is eligible for inclusion in the National Register is invalid because the determination was not made in accordance with the procedures set forth in 36 C.F.R. § 800.4(a)(2) (1975). In pertinent part, that regulation reads:

> If [the Federal] Agency Official [responsible for a specific project] determines that a property [that will be adversely affected by the project] appears to meet the [National Register] Criteria, or if it is questionable whether the Criteria are met, the Agency Official shall request, in writing, an opinion from the Secretary of the Interior respecting the property's eligibility for inclusion in the National Register. The Secretary of the Interior's opinion . . . shall be conclusive for the purposes of these procedures.

Appellees contend that, since the Secretary of Transportation, who was the agency official responsible for H-3, did not request the Interior Secretary to determine whether Moanalua was eligible for inclusion in the National Register, the Interior Secretary had no authority to make such a determination.

Initially, we note that in making this argument appellees expose their own hands, some of which are not wholly clean. The regulation expressly and unambiguously provides that "if it is questionable" whether a property meets the National Register Criteria, the responsible agency official *shall* request the Interior Secretary's opinion. It is manifest that throughout 1974 it was at least "questionable" whether Moanalua was eligible for the National Register. The Valley had been nominated for the Register as early as March, 1973, and in 1974, the Valley was the subject of studies by the Advisory Council and the State's historic review board. On May 8, 1974, the Interior Secretary published an official notice that the Valley "may be eligible" for the National Register. The Transportation Secretary here seeks to avoid the effects of his own, wholly inexcusable, noncompliance with the regulation.

Furthermore, we find nothing in NHPA or the implementing regulations that would preclude the Interior Secretary from determining, on his own initiative, whether a property is eligible for inclusion in the National Register. Such could prove to be one of his most important and enduring contributions. The procedures set forth in 36 C.F.R. § 800.4 (1975) apply only to the special situation wherein a property not previously evaluated in the light of the National Register Criteria, is in imminent danger of alteration or destruction because of an on-going or proposed Federal project. Here, before the Interior Secretary acted, Moanalua had been nominated for inclusion in the register by the Moanalua Gardens Foundation and had been studied by the Secretary's Advisory Board on National Parks, Historic Sites, Buildings, and Monuments. We believe that the Interior Secretary's determination was well within his power under the Congressional authorization conferred by the NHPA.

Finally, appellees have suggested that the Transportation Secretary's review and approval of the Environmental Impact Statement (EIS) pertaining to H-3, which includes some material concerning Moanalua's historic significance, as well as discussions of several alternatives to H-3's proposed route through the Moanalua Valley,[18] constitutes compliance with section 4(f). Section 4(f) does not require the Transportation Secretary to set forth specific findings and reasons for approving a project that will use land from parks or historic sites.[19] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-19 (1971). Nevertheless, a court reviewing the Secretary's 4(f) decision must satisfy itself that the Secretary evaluated the highway project with the mandates of section 4(f) clearly in mind. *Id.* at 416. On the administrative record, the

[18]The alternatives discussed range from not building H-3 but instead improving, in various ways, the existing Pali and Likelike Highways, to placing H-3 along different routes across Oahu. Appellants contend that the City of Honolulu, containing a major portion of Oahu's population and undeniably having a vital interest in the trans-Koolua traffic flow, supports an alternative to the construction of H-3 which would add to the Likelike Highway a single, reversible-flow lane, to be used exclusively for public bus transportation.

[19]The Secretary's own procedures do, however, contemplate the preparation of combined "environmental impact/Section 4(f)" statements. *See* Dept. of Transportation, Federal Highway Administration, Policy and Procedure Memorandum 90-1, reproduced at 23 C.F.R. 15-26 (1974).

Secretary's consistent position was not that he had complied with section 4(f) but that the statute was altogether inapplicable. In the light of that consistently recorded position, it is not possible, with factual accuracy, to conclude that the Secretary evaluated H-3 with the explicit directives of 4(f) firmly in mind. Furthermore, we note that the EIS provides no evidence that the Secretary complied with section 4(f). While the document does contain some discussion of the advantages and disadvantages of several alternatives to H-3, as the roadway is now planned, the analyses do not attempt to demonstrate, or purport to establish, that each of the alternatives is not "feasible or prudent," as those terms are defined within the context of section 4(f). *Id.* at 411-13.

We conclude that the Secretary of the Interior has determined Moanalua to be eligible for inclusion in the National Register of Historic Places and that this determination entitles the Valley to the protections Congress has established for historic sites in section 4(f). We further conclude that the Secretary of Transportation did not comply with the requirements of section 4(f) before he approved Federal funding for H-3.

IV. *Other Issues*

Appellants contend that the Secretary also failed to comply with section 4(f) with respect to Pohaku ka Luahine, which, as we have heretofore noted, is included in the National Register. Because the petroglyph rock has once been moved and now rests a short distance from its original location, the District Court concluded that the rock, and its present surroundings, do not constitute an "historic site" for the purposes of section 4(f). 389 F. Supp. at 1116.

After careful consideration, we cannot escape the conclusion that Pohaku ka Luahine, and its immediate environs, qualify for protection under section 4(f). It is clear that the rock was originally located in the Valley, and it is inseparably linked to historic events that there occurred long since. Consequently, so long as the rock remains in the Valley, even though it may stand a few feet from its original location, we believe that it forms the basis for an historic site. Further, we believe that H-3, which will pass near the rock, will "use" land from that historic site. *See Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) (a proposed highway that

would encircle a public campground would "use" that campground).

In the particular circumstances of this case, however, Pohaku ka Luahine's fate, like its historic significance, is linked to that of the Moanalua Valley. If the Secretary validly determines that there is no "feasible and prudent" alternative to the alleged desecration of the Valley, there will be no such alternative to the use of the petroglyph rock. Consequently, if the Secretary makes such a determination, the 4(f) inquiry with respect to the rock must be whether there has been "all possible planning to minimize harm."

Appellants have presented three other issues to us. They contend that the EIS for H-3 and the 4(f) statement pertaining to the Pali Golf Course are inadequate and that the H-3 project is not grounded in a continuing comprehensive State and local transportation planning process, as is required by 23 U.S.C. § 134(a) (1970). Because of our decision as to Moanalua Valley and Pohaku ka Luahine, we believe that we should not consider these issues at this time. It is altogether possible that future developments will moot these issues. In the event that the Secretary does conclude that there is no "feasible and prudent" alternative to the routing of a multi-lane highway through Moanalua, the District Court will reconsider that conclusion and these other issues in the light of all information that will then be available.

The District Court's Order dissolving the injunctions against construction of H-3 is reversed. On remand, the District Court will enjoin construction of the highway until such time that the Secretary can demonstrate his full compliance with section 4(f) as the statute applies to Moanalua Valley and Pohaku ka Luahine and has made a determination in harmony with the statutory requirements.

REVERSED AND REMANDED.

WALLACE, Circuit Judge, Concurring and Dissenting:

I concur that this case must be remanded but cannot agree with the route the majority takes to that end, nor with what it requires. The most troublesome issue for me in this case pertains to the petroglyph rock but since the majority reverses largely on the basis

of the protection supposedly accorded the Moanalua Valley, I will treat those issues first.

I. *Moanalua Valley*

While all who legitimately attempt to preserve the beauty and historical significance of our environment are to be applauded, our responsibility as judges, as I see it, is to determine whether the congressionally mandated procedures for protection require halting an approved construction project. Our review, thus, is a narrow one, not broadened by policy considerations we might inject if we were the Congress. Therefore, the sole issue in this case with respect to the valley is whether it is an historic site of national, state or local significance as determined by the federal, state or local officials having jurisdiction thereof. If so, construction of H-3 must be enjoined pending the special findings required of the Secretary of Transportation by the Department of Transportation Act of 1966 section 4(f), as amended, 49 U.S.C. § 1653(f) (Supp. 1975), and the Federal-Aid Highway Act of 1966 section 15(a), as amended, 23 U.S.C. § 138 (Supp. 1975) (the two sections are virtually identical and will hereafter be referred to together as "section 4(f)"). If not, the district court's denial of an injunction on this ground must be affirmed.

The facts are not seriously in dispute: the Secretary of the Interior has determined that the valley "may be eligible" for inclusion on the National Register of Historic Places; the Hawaii Historic Places Review Board determined that the valley had only "marginal" significance, an equivalent term for "no" significance, and was therefore not entitled to any protection under state historic site preservation laws. *See* Hawaii Rev. Stat. § 6-1 *et seq.* (1968, Supp. 1973).

The plaintiffs-appellants (appellants) assert a novel theory, rejected by the district court, which involves the use of a different statute out of context to find the bootstrap necessary to inject the Secretary of the Interior as the decision maker pursuant to section 4(f). The problem they must overcome is that the valley has no national historic significance. The local authorities did not find that it had local historic significance. Thus, they must show (1) the Secretary of the Interior found the valley had local historic significance and (2) he is an official allowed to make such a finding pursuant to section 4(f). Therefore, they pose the argument that

the Secretary of the Interior has authority under the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (1974) (NHPA), to determine the state and local historic significance of places in passing on nominations to the National Register and is therefore one of the officials having jurisdiction over the valley whose determination of historic significance triggers section 4(f) protections. This is the argument relied upon by the majority in reversing the decision of the district court and with which I cannot agree.

Turning to the statute appellants claim injects the Secretary of the Interior into section 4(f) decisions, I conclude that the Secretary had no authority based upon the facts of this case to place the valley on the National Register. Thus, even if appellants' theory were accepted that the NHPA in some fashion allows the Secretary of the Interior to decide a site has local historic significance, it would avail them nothing based upon the record in this case. Section 101(a)(1) of the NHPA, 16 U.S.C. § 470(a)(1), provides that the Secretary of the Interior is "to expand and maintain" the National Register. The Act does not expressly specify the procedure for determining which properties are to be listed on the National Register but a reasonable interpretation of all the available sources indicates that properties of state and local historic significance are not to be listed by the Secretary of the Interior unilaterally without an initial determination of significance by state officials.

Supporting this view, section 101(a)(1) of the NHPA provides that the Secretary of the Interior shall grant funds to the states for statewide historic surveys to be conducted *by the states*. Executive Order 11593 promulgated to implement the NHPA provides that the Secretary of the Interior's role under the Act is merely to encourage state and local officials to nominate federally-owned properties to the National Register, Executive Order 11593 § 3(a), 3 C.F.R. 154 (Supp. 1971), 16 U.S.C. § 470 (1974), and to advise federal agencies in the identification of historic sites. *Id.* § 3(f).

Of most significance is the notice published in the Federal Register by the Department of the Interior for the purpose of increasing "awareness of the means by which properties of State and local historical significance may be nominated for placement in the National Register . . . ." 39 Fed. Reg. 6402 (1974). It is critical to realize that this notice states that while under prior law (specifically, the Historic Sites Act of 1935, 16 U.S.C. §§ 461 *et seq.*) the

National Register included only nationally significant properties which were few in number, the NHPA "provides a means for *States* to nominate properties of *State and local significance* for placement in the National Register." 39 Fed. Reg. 6402 (1974) (emphasis added). The notice then sets forth the procedures for nominations by state officials and the criteria to be used by the National Park Service in reviewing the nominations. 39 Fed. Reg. 6403-04 (1974). Nowhere in the NHPA, the Executive Order, or the applicable regulations is the Secretary of the Interior given the authority unilaterally to determine that a property has state or local historic significance.

The appellants place great emphasis on regulations promulgated by the Advisory Council on Historic Preservation, an advisory body created by the NHPA, 16 U.S.C. § 470i (1974). These regulations arguably confer some authority on the Secretary of the Interior to determine the state and local historic significance of properties but the regulations also restrict his part in the decision-making process and give no assistance to appellants' contention that the Secretary of the Interior possesses unilateral decision-making authority. The regulations provide that even though the NHPA protects only properties actually listed on the National Register, properties merely "eligible" for listing should also be protected. To this end, the "Agency Official" of the federal agency contemplating an undertaking (here, the Secretary of Transportation) is given the burden of identifying the properties within the undertaking's potential environmental impact which are listed or eligible for listing on the National Register. Only if, after consulting with the appropriate state historic preservation officer and applying the National Register criteria set for in the regulations, the agency official determines that a property "appears to meet the Criteria, or if it is questionable whether the Criteria are met," is he required to "request, in writing, an opinion from the Secretary of the Interior respecting the property's eligibility for inclusion in the National Register." 36 C.F.R. § 800.4(a)(2) (Supp. 1975).

The Governor of Hawaii has designated the chairman of the state Department of Land and Natural Resources as the state liaison officer responsible for state activities under the NHPA. *See* 39 Fed. Reg. 6402 (1974). The Federal Highway Department Division Engineer consulted this official concerning the eligibility of the valley for listing on the National Register as a property of

state or local significance and was informed by letter of March 6, 1974, that the valley clearly did not meet the National Register criteria.

Appellants nevertheless argue that in this case the valley's eligibility for National Register listing was at least "questionable," especially in light of the Secretary of the Interior's published determination that the valley "may be eligible" for listing. They claim that in these circumstances, the regulations clearly give the Secretary of the Interior "jurisdiction" within the meaning of section 4(f) to determine the valley's local (not national) historic significance. But the regulations clearly put the initial burden of determining the eligibility of a site for National Register listing on the agency supervising the undertaking, here the Department of Transportation, and give the Secretary of the Interior no authority to make any determination until he has been asked for an opinion. Here the Secretary of Transportation consulted the appropriate state official who advised that the valley clearly was not eligible for listing. The Transportation Secretary never requested a ruling from the Secretary of the Interior and the Secretary of the Interior therefore had no authority under the regulations to make any determination with respect to the significance of the valley. It can be properly inferred that the Secretary of the Interior realized this was true when, in his letter to the Governor of the State of Hawaii, he deferred to the Secretary of Transportation's exclusive authority to make any such determination.[1]

The majority does not confront this point directly but instead asserts that the failure of the Secretary of Transportation to seek the Secretary of the Interior's opinion was "wholly inexcusable."

[1]The letter stated in part:

> In response to a recent request from the Council, we provided such an evaluation of Moanalua Valley. It reflected the consensus of the Advisory Board and the professional judgment of the National Park Service that, although not of national significance, Moanalua Valley possessed historical and cultural values of at least local dimensions and, therefore, could meet the less stringent criteria of the National Register for sites of local significance.
>
> In making this assessment, we have discharged a responsibility vested in the Secretary of the Interior by the National Historic Preservation Act and section 3(f) of Executive Order 11593. I want to make clear that this assessment does not constitute a determination of prospective eligibility for National Register designation pursuant to section 2(b) of the Executive Order, and does not, therefore, have the effect of requiring consultation on this matter between the Secretary of Transportation and the Advisory Council on Historic Preservation.
>
> The Department of Transportation is, of course, solely responsible for determining which provisions, if any, of the Executive Order, the National Historic Preservation Act, the Department of Transportation Act, and the National Environmental Policy Act are applicable to this undertaking. I understand that pending litigation on at least some of these issues must be favorably resolved before work on the highway can proceed.
>
> I hope this letter has clarified the responsibilities and actions of the Interior Department in relation to those of the Advisory Council and the Department of Transportation.

They argue that the valley's significance was at least "questionable" in light of its "nomination" to the National Register by the private Moanalua Gardens Foundation[2] and the studies of the

[2]The majority states at page 5, *ante*, that both the petroglyph rock and the valley were nominated by the Moanalua Gardens Foundation for National Register listing. The majority then argues in footnote 13, *ante*, that there was nothing irregular in the nomination of the valley and that the procedure was "essentially" the same as that leading to the National Register listing of the petroglyph rock, the validity of which the appellees do not challenge.

While it is true that the valley was nominated by the Moanalua Gardens Foundation, the petroglyph rock was in fact nominated by Hawaii's state Department of Land and Natural Resources. This not only undercuts the argument of the majority but is significant evidence supporting the position taken in this concurring and dissenting opinion.

Further, the National Park Service form 10-300 (July 1969), upon which both nominations were made, includes an item 12, "State Liaison Officer Certification," which reads in part: "As the designated State Liaison Officer for the National Historic Preservation Act of 1966 (Public Law 89-665), I hereby nominate this property for inclusion in the National Register and certify that it has been evaluated according to the criteria and procedures set forth by the National Park Service." The inclusion of this item on the form is consistent with my reading of the NHPA as limiting the Interior Secretary's statutory duty "to expand and maintain" the National Register to evaluation of nominations made in the first instance by designated state officials. Significantly, this item is at least partially filled in on the form nominating the petroglyph rock, including a designation of the title of the certifying officer as "Chairman and Member Board of Land and Natural Resources"; it is left completely blank on the form "nominating" the valley. That the Interior Secretary appreciated the significance of this difference no doubt explains why he placed the rock on the National Register, 39 Fed. Reg. 6422 (1974), but determined only that the valley "may be eligible" for such listing. *Id.* at 16175-76.

valley by the state's Historic Places Review Board and the national Advisory Council. Yet the local historic significance of the valley was not determined by the Advisory Council or the Secretary of the Interior until 1974, after the determination by the chairman of the state Department of Land and Natural Resources that the valley was clearly not eligible for National Register listing, after design approval of H-3 by the FHWA, and after the original complaint in this action was filed. Moreover, appellants have never alleged an abuse of discretion by the Secretary of Transportation in not seeking the Secretary of the Interior's opinion. In these circumstances, especially in light of the determination of no historic significance by the state official whom the Secretary of Transportation is required to consult by the very regulation relied upon by appellants, the propriety of the failure of the Secretary of Transportation to seek the Interior Secretary's opinion should not be in issue.

However, even if appellants were correct, which they were not, and the Secretary of the Interior could be said to have "jurisdiction" of the valley pursuant to this regulation, the regulation itself does not apply to this case. The regulations were issued under the authority of Executive Order 11593 § 1(3), 3 C.F.R. 154 (Supp. 1971), 16 U.S.C. § 470 (1974), which requires federal agencies to establish procedures to insure that federal activities contribute to the preservation and enhancement of non-federally owned historic sites. Thus, the Advisory Council in promulgating the regulations merely "*recommends* that Federal Agencies use these procedures as a guide in the development . . . of their [own] required internal procedures." 36 C.F.R. § 800.1(b)(2) (Supp. 1975) (emphasis added).

In this regard, the Department of Transportation had adopted its own internal procedures for historic preservation more than a year earlier. Policy and Procedure Memorandum 90-1, 37 Fed. Reg. 21809, 21812 (1972), 23 C.F.R. Pt. 1, App. A (Supp. 1974). These procedures afforded NHPA protections only to properties actually listed on the National Register and not to those merely "eligible" for listing. The procedures gave the Secretary of the Interior no role in the identification of historic properties. The same memorandum also prescribed procedures for compliance with section 4(f). Specifically, "[t]he HA [in this case, the state highway department] shall request a determination of significance from the

section 4(f) lands agency . . . ." *Id.* ¶ 6(c)(1). The memorandum does not elaborate on the identity of the "section 4(f) lands agency" but use of the singular "agency" negates appellants' argument for concurrent "jurisdiction" of the Secretary of the Interior over historic sites of local significance.

On December 2, 1974, the Department of Transportation promulgated new regulations which implicitly afford NHPA protections to properties merely eligible for listing on the National Register by requiring that the section 4(f) statement (if any) include evidence that the Advisory Council's recommended procedures have been followed for such properties. 23 C.F.R. § 771.19(b) (Supp. 1975). Significantly, however, the new regulations also provide that "[a] section 4(f) statement is not required when the Federal, State or local official having jurisdiction over a park, recreation area, refuge or historic site determines that it is not significant" (*id.* § 771.19(c)), apparently even if the property has been determined to be "eligible" for National Register listing by the Secretary of the Interior. To sum up, the Secretary of the Interior has no authority to make a unilateral determination of the local significance of an historic site for section 4(f) purposes.

The majority's final argument is that even if the Secretary of the Interior is not expressly given the authority unilaterally to determine a site's local historic significance by any of the statutes, orders, or regulations cited by the appellants, none of those provisions preclude such power. I find no authority for nor could I endorse a doctrine that the Secretary of the Interior has all powers under the NHPA not expressly withheld from him. In my judgment, such a philosophy has extreme potential dangers. But even if I were to concede that the Secretary of the Interior has such authority, I do not think that he would be an official with jurisdiction to determine local historic significance of the valley within the meaning of section 4(f).

Turning then to section 4(f) itself, it was originally enacted in 1966 as part of the Department of Transportation Act. The section provided in part: "[T]he Secretary [of Transportation] shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless . . . ." Act of October 15, 1966, Pub. L. No. 89-670, § 4(f), 80 Stat. 934. This section and section 15(a)

of the Federal-Aid Highway Act of 1966, which had been similar, were amended in 1968 so as to be virtually identical. Act of August 23, 1968, Pub. L. No. 90-495, § 18, 82 Stat. 823. The new statute provides, with the major 1968 additions emphasized:

> (f) *It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.* The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. *After August 23, 1968,* the Secretary shall not approve any program or project which requires the use of any *publicly owned* land from a public park, recreation area, or wildlife and waterfowl refuge *of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof,* or *any land* from an historic site *of national, State, or local significance as so determined by such officials* unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. § 1653(f) (Supp. 1975) (referred to herein as "section 4(f)"). I think it clear from an examination of the language of the statute itself and the legislative history that whatever authority the Secretary of the Interior may have with respect to the valley under the NHPA, he is not an official with jurisdiction of the valley within the meaning of this statute.

Before the 1968 amendment, the statute appeared to leave to the Secretary of Transportation, as the official who was to approve project or program plans, the determination whether land at issue indeed was a public park, recreation area, wildlife refuge, or historic site. *See Pennsylvania Environmental Council, Inc. v. Bartlett,* 454 F.2d 613, 621-22 (3d Cir. 1971). But the statute as amended in 1968 requires that a protected historic site have "national, State, or local significance" as determined by "the Federal,

State, or local officials having jurisdiction thereof." While the language may not be crystal clear, I think that the determination of the state or local historic significance of a privately-owned site such as the valley must be made by the state or local officials in charge of state or local historic preservation activities. *See Pennsylvania Environmental Council, Inc. v. Bartlett, supra,* 454 F.2d at 622-23; *Environmental Defense Fund v. Brinegar,* 6 E.R.C. 1577, 1593-94 (E.D. Pa. 1974); *Lathan v. Volpe,* 350 F. Supp. 262, 267-68 (W.D. Wash. 1972), *vacated in part on other grounds sub nom. Lathan v. Brinegar,* 506 F.2d 677 (9th Cir. 1974) (en banc).[3]

Appellants argue that the use by Congress of the plural "such officials" in section 4(f) demonstrates congressional recognition of the concurrent power of local and federal officials to determine the local significance of historic sites. However, the use of the plural could just as easily be an accommodation to state laws which may lodge historical preservation functions in more than one official. Further, a logical reading of that part of section 4(f) in the context of the question before us resolves the issue against appellants. The statute prohibits the Secretary of Transportation from approving any project "which requires the use of any publicly owned land from a public park, recreation area, or wildlife and

[3]Appellants assert, on the other hand, that a declaration by local officials of a preference for a highway through a locally significant site does not obviate the need for the special findings required by section 4(f) before the highway can be built. Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013, 1025-27 (5th Cir. 1971), *cert. denied,* 406 U.S. 933 (1972). *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *reversing* 309 F. Supp. 1189, 1195 (W.D. Tenn. 1970). These cases are distinguishable in that the sites involved were admittedly "of local significance"; the local officials nevertheless declared their preference for a highway. In this case, on the other hand, the local officials have not declared a preference for a highway through a locally significant site; they have determined that the site is not locally significant. The distinction is important because there are much greater local political constraints against declaring a locally important site "insignificant" than against declaring a preference for a highway. *See* Gray, *Section 4(f) of the Department of Transportation Act,* 32 Md. L. Rev. 327, 384-85 (1973). Finally, it is noteworthy that the appellants here have not directly attacked the local officials' determination that the valley is not significant as an abuse of discretion or against the law. Their only contention is that the Secretary of the Interior's contrary determination is enough to trigger the section 4(f) protections, a contention which I would reject.

waterfowl refuge [in three categories, i.e.] of national, State, or local significance as determined by [three autonomous groups, i.e.] the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless . . . ." Applying logical canons of construction to this statute, it declares that each category of property is tied to its appropriate overseer insofar as jurisdiction and the rendering of at least the initial determination of significance are concerned. Each of the three categories is thus tied, respectively, to each of the designated officials; i.e., federal officials to property of "national" significance; property having state significance, to state officials; and property of local significance, to local officials. If this is true, the "as so determined by such officials" clause in section 4(f) would seem to me to require in this case a determination by the local (or perhaps state) officials as a condition precedent to bringing the section 4(f) protections into play.

However, whatever ambiguity may appear from the language of the statute is resolved by the legislative history. The committee report accompanying the Senate version of the Federal-Aid Highway Act of 1968 (which included the amendments under discussion here) noted: "The importance of the involvement of local officials in route selection, the public hearing process, and the resolution and establishment of community goals and objectives cannot be overstated. . . . With respect to a number of proposals contained in S. 3418, as reported, local authorities would be vital participants." S. Rep. No. 1340, 90th Cong., 2d Sess. 11 (1968), *reprinted in* 3 U.S.C. Cong. & Ad. News 3482, 3492 (1968). While this passage of the report does not refer specifically to the role of local officials in determining the local historic significance of sites under section 4(f), the intent of Congress is made clear by an exchange on the floor of the Senate during discussion of the bill reported by the Conference Committee where the amendment of section 4(f) provoked one of the longest discussions. Senator Randolph, the leader of the Senate conferees, during a lengthy discussion provoked by the amendment of section 4(f) explained the theory thusly: "[I]t is important that the local people have a leadership. They can properly understand the importance of places that someone from afar may not realize. The importance of such places can *only* be understood by local people." 114 Cong. Rec. 24029 (1968)

(emphasis added). Some of the Senators, particularly Senator Yarborough of Texas who remembered the Brackenridge-Olmos Park lands case, *see Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972), voiced the concern that local officials might determine that a park important to the local people was not "significant" within the meaning of section 4(f) so as to avoid the section 4(f) protections and the possibility of having to obtain a costly privately-owned alternate right-of-way. Senator Randolph's response to this concern was not the contention asserted by the appellants that the determination of local significance is not *exclusively* delegated to local officials by section 4(f). Indeed, he seemed to concede the exclusive authority of local officials by answering that the only protection against local approval of the use of parklands and historic sites was the Secretary of Transportation's authority under Title 23 to use his independent judgment in approving or disapproving highway construction plans. 114 Cong. Rec. 24036-37 (1968).

Senator Randolph's interpretation of the amendment concerning the sole federal check on local determination of historical nonsignificance finds support in the most recent regulations promulgated by the Department of Transportation pertaining to section 4(f) procedures. The regulations provide that no section 4(f) statement is required where the official with jurisdiction determines that the property is not significant. But in that case, the regulations require: "The FHWA [Federal Highway Administration] Division Engineer shall review the agency's non-significance determination to assure himself of the reasonableness of such determinations." 23 C.F.R. § 771.19(e) (Supp. 1975).

Thus, there can be no reasonable doubt, in my judgment, that Congress did not intend the Secretary of the Interior to have authority to decide unilaterally whether local sites have historical significance. On the contrary, the legislative history of section 4(f) is clear: the protections extend to an historic site of state or local significance only if the state or local officials with authority to pass on historic values determine that a given site is significant. In this case, the state officials with such authority did not determine that the valley had historic significance, the Secretary of Transportation did not exercise his independent veto power and, therefore, no section 4(f) findings were required.

II. *The Petroglyph Rock*

The petroglyph rock presents a different problem. The rock was placed on the National Register of Historic Places by the Secretary of the Interior after being nominated by the state Historic Places Review Board. The Board's nomination of the rock should be considered a finding of local historic significance by state officials with jurisdiction so as to trigger section 4(f) protections, assuming the other prerequisites are met.

Besides "significance," section 4(f) requires that the project "use" the historic site. The appellants alleged that H-3 would use the rock but the trial court made no findings on the issue and the point has not been argued during this appeal. *Brooks v. Volpe,* 460 F.2d 1193, 1194 (9th Cir. 1972), requires a broad construction of the word "use" so as to require section 4(f) statements wherever there is a substantial question of adverse impact. In that case, we held that the encirclement of a public campground by the challenged highway was a "use" of the campground. In *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation,* 362 F. Supp. 627, 638-39 (D. Vt. 1973), *aff'd,* 508 F.2d 927 (2d Cir. 1974), the court held that construction of a highway adjacent to a potential wilderness area was a "use" of that land.

In both of these cases, however, the significance of the recreation area depended on its solitude and isolation which would be jeopardized by construction of the highway. In this case, on the other hand, the significance of the rock is primarily as an object of viewing and study which could actually be facilitated by the construction of the highway. This view is supported by the findings of the state Historic Places Review Board. The application for listing on the National Register attached great significance to the rock itself but did not give any weight to the rock's particular location. On the contrary, the Board has found that the valley is only of "marginal" significance.

On the record before us, I doubt whether the appellants have established that the highway would "use" the rock within the meaning of section 4(f). Since the trial court made no findings on the issue, however, I would remand the case for a hearing and a determination by the district judge. Although we have held that the determination of "use" of a site by a highway is a question of law and not fact, *Brooks v. Volpe, supra,* 460 F.2d at 1194, we cannot

resolve the legal issue in the absence of evidence and findings on the effect of the highway on the rock.

I am not of the opinion that any of the other issues raised by the appellants require reversal and therefore would reverse and remand only to the limited extent indicated above.

APPENDIX B

Order of United States Court of Appeals for the Ninth Circuit Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 75-1552

FILED MAY 21 1976

STOP H-3 ASSOCIATION, *et al.*, and
HUI MALAMA AINA O KO'OLAU, *et al.*,

Appellants,

—V.—

WILLIAM T. COLEMAN, JR., as Secretary of the United States Department of Transportation, *et al.*,

Appellees.

ORDER

Before:

KOELSCH, ELY and WALLACE,

Circuit Judges.

Of the judges constituting the panel originally concerned with the subject case (Koelsch, Ely, and Wallace), Judges Koelsch and Ely have voted to deny the Petition for Rehearing. Judge Wallace would grant panel rehearing. The

three judges have voted unanimously to reject the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

APPENDIX C

Opinion of United States District Court for the District of Hawaii

UNITED STATES DISTRICT COURT,

D. HAWAII.

Dec. 26, 1974.

Civ. Nos. 72-3606, 73-3794.

STOP H-3 ASSOCIATION a Hawaiian non-profit corporation, *et al.*,

Plaintiffs,

—v.—

CLAUDE S. BRINEGAR, Individually and as Secretary of the United States Department of Transportation, *et al.*,

Defendants.

HUI MALAMA AINA O KO'OLAU *et al.*,

Plaintiffs,

—v.—

CLAUDE BRINEGAR, Individually and as Secretary of Transportation, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SAMUEL P. KING, *Chief Judge.*

STATEMENT OF THE CASE

This case involves the construction of (T)H-3, a defense interstate highway on the island of Oahu, State of Hawaii.

The original complaint in Civil No. 72-3606 was filed on July 19, 1972. After several amendments, a consolidated complaint entitled Compilation of Complaint for Injunctive and Declaratory Relief, as Amended and Supplemented, was filed and received in evidence on December 3, 1974, as Court's Exhibit 2. Consolidated answers were filed by the federal defendants on December 3, 1974, and by the state defendants on December 4, 1974. The consolidated complaint set forth seven causes of action. On December 10, 1974, the complaint was amended to add an eighth cause of action. This was duly answered by the state defendants on December 18, 1974, and by the federal defendants on December 23, 1974.

A separate complaint, Civil No. 73–3794, was filed on April 9, 1973, by additional plaintiffs against the same defendants with relation to the same highway. Inasmuch as this complaint included issues not raised in Civil No. 72–3606, an earlier attempt on March 16, 1973, to intervene, was denied, and the two actions were not at first consolidated. By stipulation entered December 3, 1974, the plaintiffs in Civil No. 73–3794 agreed to a dismissal of certain of their claims, rendering the issues in both actions identical, and the two suits were consolidated for trial on the merits. Answers to this complaint were duly filed by the state defendants on May 1, 1973, and by the federal defendants on June 7, 1973.

At the time of the filing of the complaint in Civil No. 72–3606, one of the issues raised was that the defendants had failed to comply with Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C)). The Secretary of Transportation took the same position. He had instructed the state authorities to provide additional information. Thus there was no approved environmental impact statement upon which to base the processing of federal-aid funds for this highway. On the other hand, two segments of the highway were already under construction, and the defendants took the position that, in applying NEPA to this project, further construction on these two segments should not be enjoined.

There being something to be said on both sides, the parties sensibly reached an agreement which was filed on September 15, 1972, in the form of a stipulation approved and ordered by the court. The stipulation permitted continued construction of the Halawa Interchange and that segment of the highway extending from (but not including) the Halekou Interchange to the Kaneohe Marine Corps Air Station, and enjoined all other construction, further acquisition of right of way, and further letting of contracts on the rest of the highway, which was identified as the Moanalua-Haiku Segment. After approval of an EIS, the adequacy of the EIS and all other issues still unresolved would be litigated.

On September 22, 1972, defendants moved for an order requiring plaintiffs to furnish security in the amount of $337,300 or such other amount as the court should deem proper. A bond of $100 was ordered.

Defendants then sought a "clarification" of the stipulation to permit the completion of test borings and the continuation of design work, both with respect to the Moanalua-Haiku Segment. Test borings which had been physically begun were allowed to be completed, but the expenditure of funds for further test borings or design work was specifically enjoined by decision and order entered October 18, 1972. Stop H–3 Association v. Volpe, 349 F.Supp. 1047 (D. Hawaii 1972).

These issues were reargued on defendants' application filed on October 24, 1972, for stay of the injunction pending appeal. The motion for a stay was denied on December 18, 1972. Stop H–3 Association v. Volpe, 353 F.Supp. 14 (D. Hawaii 1972).

On December 11, 1972, defendants moved for an amendment to allow further test borings under an existing contract. On December 19, 1972, the motion was denied.

On March 1, 1973, plaintiffs filed a motion for partial summary judgment compelling new hearings pursuant to 23 U.S.C. § 128. On May 3, 1973, plaintiffs filed a motion for partial summary judgment ordering the "Preface" to the EIS to be circulated for comment. On July 6, 1973, the court entered findings of fact, conclusions of law, and an order requiring the so-called preface to be circulated and reviewed in accordance with the provisions of FHWA PPM 90–1, paragraph 6, and of Section 102(2)(C) of NEPA. On July 13, 1973, the court entered statement of facts, conclusions of law, and an order requiring new public hearings complying with 23 U.S.C. § 128(a) and (b), as amended in 1968 and in 1970, with FHWA PPM 20–8, and with 23 C.F.R. § 790, as amended through May 9, 1973.

On April 22, 1974, defendants filed a motion for an "interpretation" of the stipulation and injunction of September 15, 1972, to exclude from the terms of the injunction certain portions of the highway segment between the

Kaneohe Marine Corps Air Station and the Halekou Interchange. It was clear that the defendants sought not an "interpretation" but an amendment. The motion was denied on May 8, 1974.

During these past two years, considerable activity was taking place. New section 128 hearings were held. The preface, and certain appendices resulting from the hearings, were circulated for review. The construction of the highway became a political issue in the 1974 gubernatorial campaign. The valley through which the highway was to be built was considered for inclusion in the National Register of Historic Sites and other aspects of 23 U.S.C. § 138 (49 U.S.C. § 1653(f)) and of 16 U.S.C. § 470, were explored.

Finally on October 29, 1974, defendants filed a motion for an order dissolving the existing injunction on the ground that all requirements preliminary to the federal action contemplated had been met. On November 15, 1974, the court granted defendants' motion for a trial on the merits as to all causes of action in Civil No. 72–3606, to commence December 3, 1974. As noted earlier, Civil No. 73–3794 was later consolidated with Civil No. 72–3606 for trial on the merits. In pretrial it was agreed that defendants would proceed first to put on their evidence showing compliance with all statutes, regulations, orders, policies and procedures referred to by plaintiffs in their complaints; that plaintiffs would then put on their evidence as to noncompliance or faulty compliance; and that either side would then put on whatever rebuttal and sur-rebuttal was appropriate, all without altering the burden of persuasion. Trial on the merits was held as scheduled, and the matter is now before me for decision.

ISSUES

Plaintiffs' consolidated complaint as amended in 72–3606 contains eight causes of action. Plaintiffs' complaint in 73–3794 raises essentially the same issues as are raised in the first, third, and fourth causes of action in 72–3606, with special emphasis on the social and economic effects of the project on the residents of Kahaluu. These causes of action assert claims as follows:

(A) Non-compliance with NEPA.

(B) Non-compliance with 23 U.S.C. § 128 and PPM 20–8, relating to public hearings.

(C) Non-compliance with 23 U.S.C. § 134, relating to the continuing comprehensive cooperative process for transportation planning in urban areas.

(D) Non-compliance with those provisions of the Charter of the City and County of Honolulu relating to the general plan.

(E) Non-compliance with 49 U.S.C. § 1653(f) and 23 U.S.C. § 138, relating to preservation of parklands.

(F) Non-compliance with 23 U.S.C. § 109(a) and (j), relating to air quality.

(G) Non-compliance with the National Historic Preservation Act.

(H) Non-compliance with DOT I.M. 50–3–71, relating to urban transportation planning as it affects project approval.

The original complaint having been filed in July 1972, and the case being submitted on the merits in December 1974, certain intervening events have rendered some of these causes of action moot at this time. Plaintiffs acknowledged this state of the record upon completion of the trial by withdrawing their second cause of action relating to public hearings pursuant to 23 U.S.C. § 128 and PPM 20–8, the second alternative claim to their third cause of action relating to transportation planning, and their sixth cause of action relating to air quality.

A. NEPA

Plaintiffs argue that defendants failed to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4347, in eight specific particulars as follows:

1. The EIS fails to discuss adequately the need for the highway.

2. The EIS fails to reflect FHWA compliance with the National Historic Preservation Act of 1966.

3. The EIS fails to describe adequately the impact of the project on historical resources.

4. The EIS fails to adopt the findings of various federal agencies who have expertise in determining the impact of the project.

5. The EIS fails to describe adequately the secondary effects of the project.

6. The EIS fails to describe adequately the measures to be taken to mitigate the adverse effects of the project.

7. The EIS fails to reflect, and defendants failed to engage in, any meaningful cost-benefit analysis of the project and the reasonable alternatives thereto.

8. The EIS fails to discuss adequately reasonable alternatives to the project.

A.1. The adequacy of the EIS discussion as to the need for the highway.

PPM 90–1, Appendix E, paragraph 2a, sets out as a minimum the matters to be covered in an EIS with respect to a "description of the proposed highway improvement and its surroundings." Among the matters catalogued is "the need for the proposal".

PPM 90–1 is not any more explicit as to what constitutes a minimum discussion of "the need for the proposal". Plaintiffs argue that the EIS only presents a justification for an assumed need by uncritically accepting a high figure as to the number of persons to be moved across the Koolau Mountains in the peak direction during the peak hour of use (12,760 persons), a low factor of those who would use mass transit facilities (21.9%), a low per car occupancy (1.2 persons), and a low lane capacity (1200 vehicles per hour), all of which are open to serious questions, none of which have been discussed in the EIS. Plaintiffs point to CEQ Guidelines 40 C.F.R. 1500.8(a)(4) relating to the type of analysis required concerning alternative proposals as suggesting as a minimum the same kind of analysis with respect to the proposal itself. They suggest that two pages in the EIS, Volume I pp. 12–13, are inadequate to cover this subject.

Defendants argue that the figures used in determining the need for the additional lanes of traffic were not assump-

tions without foundation, but were taken from the Oahu Transportation Study. They also object to the issue as being raised for the first time in final argument.

I find that the issue is fairly before the court for decision. I find that the discussion of "the need for the proposal" meets the requirements of CEQ Guidelines, PPM 90–1, and NEPA.

Aside from the discussion at EIS Volume I pp. 12–13, there are other portions of the EIS addressed to this matter. Alternative computations are discussed in EIS Preface pp. 3–4 (Impact on Trans-Koolau Transit Utilization), pp. 7–8 (Land Use), Exhibit 5 (Interstate Route H-3 and Land Use on Windward Oahu), and in EIS Appendix B pp. 43–48 (Transportation and Traffic Flow), 59–63 (The Transportation Problem), pp. 31–33 (Land Use), and pp. 64–69 (Land Use Planning and Oahu General Plan). There are other portions of the EIS that relate to this issue, as, for example, the Oahu General Plan itself, which is contained in a pocket part of EIS Preface.

A.2. EIS reflection of FHWA compliance with the National Historic Preservation Act of 1966.

PPM 90–1, Appendix E, paragraph 3e provides that "when National Register Properties are involved", evidence that the provisions of 16 U.S.C. § 470f (Section 106 of the Historic Preservation Act of 1966), have been satisfied, "should be included" in the EIS, "when pertinent and available", "to the extent practicable".

PPM 90–1, paragraph 5d, suggests that the provisions of 16 U.S.C. § 470f "should be satisfied" before submitting the final EIS to the FHWA.

CEQ Guidelines 40 C.F.R. 1500.9(a) suggests that "to the extent possible", statements or findings concerning environmental impact required by other statutes, such as 49 U.S.C. § 1653(f) or section 106 of the National Historic Preservation Act of 1966, should be combined with the EIS prepared pursuant to NEPA, "to yield a single document which meets all applicable requirements."

DOT Order 5610.1A, paragraph 9, contemplates that the NEPA EIS shall be prepared in such a manner as to meet the statement requirements of, among other statutes, section 4(f) of the DOT Act, and section 106 of the Historic Preservation Act.

Regulations promulgated by the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, require early identification and protection of properties that are included in or eligible for inclusion in the National Register of Historic Places and a draft environmental statement prepared in compliance with NEPA. *See* especially 36 C.F.R. 800.4(a) and 800.6(e)(2).

Plaintiffs argue that the EIS is woefully deficient in respect to this type of information in relation to several sites and objects entitled to protection. These are:

(a) Pohaku ka Luahine—which was placed on the National Register of Historic Places on July 26, 1973.

(b) Moanalua Valley—which was determined to be likely to be eligible for listing on the National Register of Historic Places on March 29, 1974, the determination having been published on May 8, 1974 (39 Fed.Reg. 16176).

(c) Properties possessing historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact.

One of the difficulties in applying new law to old projects is that steps that would now be taken early in the process

must be superimposed on a process that has gone on for several years. The H-3 project dates from about 1964–1965. The first 6 volumes of what was then called a final EIS were submitted to the FHWA by the State on August 2, 1972. These volumes were followed by a Preface and two Appendices, the former submitted March 15, 1973, and the latter submitted December 26, 1973. EIS Volume I pp. 24–34 and 63–68 discuss petroglyph rocks (of which Pohaku ka Luahine is one), other archeological sites in Moanalua Valley, Bishop Museum archeological studies which appear as EIS Volume IV Appendix 4(e), and agreements contemplated between the State and the owners of Moanalua Valley to minimize the impact of the highway on the archeological sites and valley itself.

The EIS Preface pp. 2, 8–9, and Exhibit 6, set out at some length discussions and proposed agreements between the State and the Damon Estate regarding Pohaku ka Luahine and Moanalua Valley. EIS Appendix A, pp. 183–368 contains extensive material regarding the historic importance of Moanalua Valley. EIS Appendix B, pp. 34–42, 97–102, and Attachment III, discuss Moanalua Valley and Pohaku ka Luahine.

I find that the discussions in the EIS of the impact of the highway on properties possessing historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact, especially with respect to the petroglyph rock Pohaku ka Luahine and to Moanalua Valley, were adequate when submitted both for purposes of NEPA and for purposes of a 4(f) statement. The fact that the 4(f) requirements may not have been satisfied before the final EIS was submitted to the FHWA on December 26, 1973, or that additional

information may now be required for an adequate 4(f) statement, does not require that the entire EIS be recalled, revoked, and resubmitted. The major considerations and disputes surrounding the preservation of historical sites that might be affected by this project were clearly expounded and brought to the attention of the responsible state and federal decision-making officials.

Furthermore, the responsible government officials had good reason to believe in December 1973 that agreements had been reached regarding the protection of Pohaku ka Luahine and the minimization of adverse effects on Moanalua Valley.

Plaintiffs suggest that there are numerous other historic sites, particularly on Windward Oahu, that should have been discussed in the EIS. No one came forward with a serious contention that any other such site would be affected by the highway.

A.3. The adequacy of the EIS discussion of the impact of the project on historical resources.

A reading of sections 102(2)(C)(i) and (ii) of NEPA, PPM 90–1 Appendix E, CEQ Guidelines 40 C.F.R. 1500, et seq., and DOT Order 5610.1A, does lead to the conclusion that an EIS which is developed from scratch as of today should describe the significant impacts of the project on historic sites, landmarks, cultural or scenic resources of national, state or local significance, and any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge.

Plaintiffs reargue in this regard the insufficiency of the EIS (i) in failing to identify Moanalua Valley as a site protected by 16 U.S.C. § 470f, (ii) in failing to identify the adverse effects of the project on Pohaku ka Luahine, (iii)

in failing to identify various historically significant sites in Halawa Valley and Moanalua Valley, (iv) in failing to discuss the effect of the project on historical resources located on Windward Oahu, and (v) in failing to include any discussion of the proposed taking of 4.09 acres of the Pali Golf Course.

For the reasons set out above under A.2, I find that the discussion in the EIS is adequate compliance with the referenced statutes, regulations, orders, policy memoranda, and guidelines.

While it is true that the taking of the Pali Golf Course property is not discussed in what has been identified as the EIS, a separate Report on the Pali Golf Course was submitted to FHWA by the state on October 5, 1971. It would seem that in this instance the state was following good practice in attempting to satisfy 4(f) requirements before submitting the final EIS.

In any event, plaintiffs do not contend that the responsible state and federal decision-makers were not aware of the Report on the Pali Golf Course, or that the report was not circulated and reviewed by the proper officials. They do contend that the report should have been incorporated in, and circulated at the same time as, the submission labeled "Final Environmental Statement". This is exalting form over substance.

An examination of the actual area taken shows that the land in question is not part of the golf course playing area. This may account for the fact that no witness has complained about this taking, and that plaintiffs did not attack the adequacy of the report as a 4(f) statement.

A.4. Adoption of findings of various federal agencies having expertise in certain areas.

Section 102(2)(C) of NEPA requires that the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a contemplated major federal action significantly affecting the quality of the human environment. Statements, comments and views of such officials are required to be circulated with the proposal for action through the existing agency review process. The views of such agencies must be given careful consideration and cannot be ignored or overridden without what amounts to a showing of good cause.

Plaintiffs contend that defendants failed to defer to a CEQ statement that the EIS was inadequate in certain respects, and failed to defer to EPA criticisms of the air pollution studies, the assertion that the highway will not affect development rates on Windward Oahu, and the assessment of the impact on Kaneohe Bay.

Much was made of the competing and allegedly contradictory air pollution studies by different experts. Without reviewing all of this evidence, the fact is that defendants did not ignore EPA's criticisms but spent considerable time and money checking and rechecking their results. The final result cannot be said to be that EPA has been overridden in any event, as the EPA letter only called for more information which was supplied. I am not aware that EPA thereafter disapproved the EIS's discussion of air quality.

Similarly, with respect to the other comments by CEQ and EPA, defendants responded with specific replies. As these bodies raised questions rather than stated facts, there is no direct contravention of their expertise.

A.5. The adequacy of the EIS discussion as to the secondary effects of the project.

NEPA, CEQ Guidelines 40 C.F.R. 1500.8(a)(3)(ii) and PPM 90–1, Appendix E, paragraph 2.b.(1), require a discussion in the EIS of the secondary or indirect consequences for the environment of the project. Examples of matters to look for are given, such as associated investments, changed patterns of social and economic activities, and changes in population patterns or growth, and their effects upon the resource base, land use, water, and public services.

Plaintiffs fault defendants in this regard for not conducting an adequate research program of all possible potential secondary impacts suggested by existing knowledge, not considering the secondary impacts outside of "Census Track 103", and inadequately discussing the secondary impacts within "Census Track 103".

An in-depth socio-economic study was conducted by the state on the Heeia-Kahaluu Kualoa area. This study is included in EIS Appendix B as Attachment IV. Socio-economic effects in general are discussed in EIS Volume I pp. 55–58. Population growth and distribution is discussed in EIS Preface Exhibit 5 pp. 1–12. Further socio-economic considerations are discussed in EIS Appendix A and Appendix B. Reviewing this discussion, I find that it is an adequate statement of the secondary or indirect consequences of the project as required by applicable statutes, regulations, and guidelines.

A.6. The adequacy of the EIS description of mitigating measures to be taken.

NEPA implies a requirement that action be taken to mitigate the adverse effects of major federal actions.

Plaintiffs argue that the EIS is deficient in this area because it does not adequately discuss the adverse effects of the highway (especially the socio-economic effects), and to the extent that it does discuss such effects, the individuals affected were not consulted and the federal, state, and local agencies best equipped to suggest ways to minimize harm were never asked to do so.

Assuming there is more to this requirement than the procedural steps detailed in NEPA and supporting directives, the short answer is that plaintiffs' contention is simply not correct. The review process itself is a request to concerned agencies for comments and suggestions. Extensive public hearings were held at which those affected could be heard. Written comments from anyone were solicited. Specific steps to be taken to mitigate specific adverse effects are discussed in the EIS, as for example with respect to noise at EIS Preface pp. 4–7.

There is no such failure of the EIS to discuss mitigation of adverse effects as to render the EIS inadequate.

A.7. Cost-benefit analysis of the project and of the reasonable alternatives thereto.

NEPA and supporting directives require that methods and procedures be developed which will insure that unquantified environmental amenities and values may be given appropriate consideration in decision making. Case law explains this requirement in terms of a balancing judgment to be made by the responsible decision-making officials whereby the particular economic and technical benefits of planned action are assessed and weighed against the environmental costs in order to ensure that the optionally beneficial (minimally adverse) action is finally taken. This evaluation is discussed today in terms of cost-benefit analy-

sis. Combined with the requirement that alternatives to the proposed action (including no action) must be set out in detail in an EIS, the developed state of the art would suggest a cost-benefit analysis for each alternative which would imply a study of each alternative to the same depth as the main proposal.

Plaintiffs assert that the EIS is inadequate because it does not contain any such cost-benefit analysis.

Plaintiffs' expert testified that the EIS here was deficient in cost-benefit analysis. He made a very convincing presentation as to how this should be done. He then stated that he had not yet read an adequate cost-benefit analysis in an EIS for a transportation project, and that the EIS here was no worse in this respect than the others. He added that the EIS here was about what one would expect given the state of the art at the time it was written.

As federal agencies become more sophisticated in the identification and quantification of environmental impacts, the balancing of costs and benefits, and the comparison of alternatives, they will no doubt develop some standard methodologies that will turn up in new guidelines or policy and procedural memoranda. So far, no particular method of cost-benefit analysis has been decreed for use in an EIS.

The EIS for (T)H–3 does contain a discussion of the costs and of the benefits of the proposed highway and of certain alternatives. Primitive as it may be, it is no worse than other early attempts in this area. It was not condemned by CEQ or EPA. There is no doubt that the advantages and disadvantages of the project were aired at length and in depth at the section 128 hearings, as reflected in EIS Appendices A and B.

An underlying consideration is that this project assumes the Oahu General Plan. Considerations of costs and bene-

fits went into the development of the Oahu General Plan. It is an authoritative statement of policy. Plaintiffs would have the EIS reflect a reconsideration of the decisions reached in the Oahu General Plan. In fact the Oahu General Plan is now in the process of revision. The same city and state authorities whose concurrence is necessary to the future of (T)H–3 are involved in this process of revision. The inclusion of the Oahu General Plan in the EIS means a great deal more to them, and to the responsible federal officials, in terms of what it says as to relative costs and benefits of proposed actions than would pages of words or mathematical models.

Some individuals respond to prose, some to mathematics, some to charts. The EIS has some of each method of communication. Taken as a whole, it adequately deals with the costs and benefits of the proposed action and of the alternatives examined.

A.8. The adequacy of the EIS discussion of alternatives.

An EIS must discuss alternatives to the proposed action. Not all possible alternatives need be discussed, but only those alternatives that are reasonably feasible. The alternative of abandoning the proposal must be discussed.

Plaintiffs argue that no meaningful study of alternatives has been made because there had been a commitment in 1965 to construct H–3, and that there is a reasonable and feasible alternative proposed by the City and County of Honolulu which is not discussed in the EIS.

Here again, we are faced with the problem of applying new law to old projects. It is true that a decision was made in 1965 to construct H–3. The decision was reached in accordance with all applicable federal, state, and local statutes, ordinances, regulations, memoranda, directives, and

policies, then in effect. The subsequent passage of the several environmental laws has required rethinking and restudying, but could not undo all of the earlier actions.

The consideration of alternatives was not invented by NEPA. Under the earlier procedures and as a result of corridor hearings, the responsible officials changed the original proposal which was to increase the capacity of Likelike Highway, and settled on the route through Moanalua Valley instead, because of the unacceptable socio-economic effects of the original proposal on the residents of Kalihi Valley. It is ironic that the city's alternative proposal would shift back to Kalihi Valley.

The fact is that an alternative not unlike the city's proposal is discussed at length in the EIS. It is also a fact that in the EIS review processes, H–3 was modified to (T)H–3, one of the reasonably feasible alternatives to the original H–3 project.

There is no evidence that there is any other reasonably feasible alternative that should be discussed in the EIS.

Plaintiffs argue that defendants did not put the requisite time and effort into developing alternatives in depth. Assuming this is a requirement of NEPA, the record is to the contrary. Extensive studies of alternative corridors were made in 1964–1965. An alternative to the original corridor was in fact selected. Many of the studies relating to H–3 or (T)H–3 apply equally to the Likelike Highway alternatives.

I find that the EIS contains an adequate discussion of alternatives to the proposed action.

B. Section 128 Hearings

Following the court's order of July 13, 1973, entering partial summary judgment in favor of plaintiffs, new public hearings were held on August 27, 28, 29, 30, and 31, and on

September 4, 1973. EIS Appendix B summarizes and discusses the testimony and material received at these hearings.

Plaintiffs are satisfied that defendants have now complied with the provisions of 23 U.S.C. § 128, PPM 20–8, PPM 90–1, and 23 C.F.R. 790, as they relate to public hearings. Accordingly, plaintiffs have withdrawn any further prayer for relief pursuant to the second cause of action in 72–3606.

C. The CCC Process

Section 105 of the Federal-Aid Highway Act commands in paragraph (d) that in approving programs for projects on the federal-aid urban system, the secretary of transportation "shall require that such projects be selected by the appropriate local officials with the concurrence of the State highway department of each State and, in urbanized areas, also in accordance with the planning process required pursuant to section 134".

Plaintiffs have proceeded on the assumption that (T)H–3 is a project on the federal-aid urban system. This system is defined in section 101 as "the Federal-aid highway system described in subsection (d)" of the section. Subsection (d) refers again to the planning process under section 134.

Actually (T)H–3 is part of the National System of Interstate and Defense Highways described in subsection (e) of section 103. Approval of projects on this system are not specifically required to be selected by local officials or in accordance with the planning process under section 134.

There is also some confusion as to whether (T)H–3 can be considered to be a project in an "urban area" or "urbanized area" as those terms are used in the highway act. It

would appear that the federal-aid urban system contemplates routes entirely within urban areas.

On the other hand, an early instructional memorandum required the concurrence of the City and County of Honolulu, and the situation in Hawaii is such that the designation of H–1, H–2, and H–3 as part of the Interstate System would appear to have been more for the purpose of eligibility for federal funds allocated to this system than for the purpose of overriding local concerns.

Assuming that the planning process of section 134 applies to the approval of (T)H–3, plaintiffs argue that the requirements of this section have not been met and that such failure must result in an injunction prohibiting further expenditure of federal funds on H–3. To understand this argument, some exposition of the section 134 planning process is necessary.

Section 134 mandates that the secretary of transportation "shall not approve under section 105 . . . any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section." This is known as the 3C process—continuing, comprehensive, cooperative.

The 3C process is spelled out in PPM 50–9. There must be a formal procedure supported by a written memorandum of understanding between the state highway department and the governing body of the local community "for carrying out the transportation planning process in a manner that will insure that the planning decisions are reflective of and responsive to both the programs of the State highway department and the needs and desires of the local communities."

There is such a formal procedure for Oahu. It is known as the OTPP (Oahu Transportation Planning Program). It establishes a policy committee of 4 members—2 from the state and 2 from the city. The memorandum of understanding provides that decisions of the committee shall be reached only upon unanimous agreement.

The planning process includes and requires the development and continuous evaluation of short-range and long-range highway and transportation plans. These plans are to be updated annually. The entire 3C process is to be certified annually by the regional FHW Administrator. Without this certification, the requirements of section 134 have not been met and project approval will not be granted.

Short-range and long-range highway and transportation plans for Oahu were developed beginning with the year 1972. H–3 was duly reflected on both sets of plans by unanimous agreement of the OTPP policy committee. FHWA certification was duly obtained. The same process was repeated in 1973. Then in 1974 the OTPP policy committee voted 2–2 on H–3 as part of the 1974–1979 short-range plan. All other projects were included or excluded by unanimous vote, but the status of H–3 remained in doubt.

FHWA officials took note of this disagreement and granted conditional certification of the 3C process for 1974–1975. Certain deficiencies in the process were noted, among them the stalemate caused by the unanimous agreement provision of the OTPP. Presumably, if these deficiencies are not corrected, certification will be withdrawn, and all federal-aid highway assistance not already committed will cease.

It is this situation which plaintiffs argue constitutes noncompliance with section 134.

What took place at the policy committee meeting on June 24, 1974 at which H–3 received a vote of 2–2 is disputed.

The city's position is that the motion before the body was to include H–3 in the 1974–1979 short-range plan. The state's position is that the motion before the body was to delete H–3 from the 1974–1979 short-range plan. In either case, the motion failed to carry.

I find from the evidence that the state's position is correct. H–3 is still part of the long-range plan and has not yet been deleted from the short-range plan. Administrative effectiveness requires continuity of decisions reached unless changed by affirmative action.

Furthermore, the regional FHW Administrator's conditional certification was a reasonable action within his authority under the circumstances. To what extent the city-state dispute may affect FHWA support of (T)H–3 is a matter within the administrative discretion of FHWA officials. So far, the procedural requirements of section 134 have been met.

While plaintiffs withdrew their second alternative claim to the third cause of action, the foregoing discussion relates to both alternative claims.

Defendants suggest that the OTPP memorandum of agreement is invalidated by the Hawaii State Constitution Article III Section 17. I find no merit in that argument.

D. The City Charter

H.R.S. § 264–36 requires all federal-aid highway projects to conform to the master plans of the respective political subdivisions of the state.

On Oahu, the master plan adopted in 1964 pursuant to the provisions of the 1959 charter of the City and County of Honolulu is known as the Oahu General Plan. As originally adopted the OGP did not reflect the alignment of H–1, H–2, or H–3. These were added to the OGP by council action on May 21, 1974. At this time, the city charter

had been amended. Assuming the requirements for placing the interstate highway system on the OGP would be the same under either the 1959 or the 1973 charter, I find that the process was validly carried out.

The plaintiffs argue that the council failed to take into consideration the matters required by the charter provisions, and failed to meet the requirements imposed by the Hawaii Supreme Court in Dalton v. City and County of Honolulu, 51 Haw. 400, 462 P.2d 199.

Assuming that I have the jurisdiction to go behind the council's action, I find that the requirements of the city charter(s) and of the *Dalton* case were met and that H–3 is validly part of the OGP.

The council committee's report on the ordinance (to indicate the H–3 highway) reflects extensive study and many hours of public hearings. There are extensive findings of fact. Clearly the council carefully considered the general welfare and prosperity of the residents of the city and the physical, social, economic and governmental conditions and trends involved.

There was evidence that no new socio-economic studies were made in connection with this ordinance. In this connection it is noted that the original OGP contemplated the development of the defense highway systems from Pearl Harbor to Diamond Head and from Pearl Harbor to Kaneohe Naval Station on the Windward side.

E. Preservation of Parklands

23 U.S.C. § 138 and 49 U.S.C. § 1653(f) prohibit the secretary of transportation from approving any program or project which requires the use of any publicly owned land from a public park or similar area, or any land from an historic site of national, state, or local significance, unless

(1) there is no feasible and prudent alternative to such use, and (2) the program includes all possible planning to minimize harm to the area resulting from such use.

Plaintiffs assert that the provisions of these statutes, for ease of reference called the 4(f) requirements, have not been met with respect to (1) the Pali Golf Course, (2) the petroglyph rock Pohaku ka Luahine, and (3) Moanalua Valley.

E.1. The Pali Golf Course

It is admitted that the Pali Golf Course is a publicly owned recreation area to which section 138 applies inasmuch as some 4 acres from the park will be taken to accommodate an off-ramp.

A 4(f) statement on this use was prepared. On December 3, 1974, the secretary of transportation made the required 4(f) finding. In doing so he had before him not only the separate statement on the Pali Golf Course but also the other volumes constituting the EIS.

Plaintiffs argue that the secretary's determination is wholly inadequate. Measured by the standards developed in cases arising under this statute, the secretary's determination of no feasible and prudent alternative and of all possible planning to minimize harm is supported by the record.

The actual taking is of minor proportions. An earlier plan that would have infringed upon the playing area was modified. The use of the golf course is not affected in any manner. If anything, the course is made more accessible to the public. No dislocation of facilities or persons is involved. The 4(f) statement adequately discusses why suggested alternatives are not feasible and prudent.

E.2. Pohaku ka Luahine

This petroglyph rock was placed on the National Register of Historic Places on July 26, 1973. It is therefore entitled to the protections afforded by the National Historic Preservation Act.

Defendants argue that the rock is not, however, subject to 4(f) requirements because it is an object and not a site.

It is true that the rock was nominated to and placed on the National Register as an object having local significance. Nevertheless, if the rock were still in its original location, I would have no difficulty in interpreting the listing as referring to a site. The evidence is clear, however, that the rock was bulldozed out of its original location and dumped into the stream area along with other rocks and debris several years ago. It was recovered and replaced in its approximate original location. It could just as well be moved again. Being privately owned, it could be removed from the Moanalua Valley entirely. Under the circumstances, I find that 4(f) procedures are not applicable to Pohaku ka Luahine.

It may be noted that the defendants and the owners of the rock had reached a tentative agreement for a satisfactory mitigation of adverse effect on the rock. A memorandum of agreement was prepared but remains unexecuted. If 4(f) procedures do apply, such an agreement would satisfy the provisions of 36 C.F.R. 800.5. No doubt this litigation has delayed further action with respect to such an agreement.

E.3. Moanalua Valley

The issue as to whether 4(f) applies to Moanalua Valley turns upon whether the valley is an historic site of local significance as determined by federal, state, or local officials having jurisdiction thereof.

The valley is privately owned. The project requires the use of land from the valley. Is it "an historic site"?

The section leaves the determination of what is an historic site on private land to "federal, state, or local officials having jurisdiction thereof".

On May 8, 1974, the secretary of interior published his determination that Moanalua Valley "may be eligible" for inclusion on the National Register as a historic place of local significance. On August 5, 1974, the Hawaii Historic Places Review Board determined the valley to be of marginal local significance. The secretary of transportation thereafter determined that 4(f) does not apply to Moanalua Valley.

Executive Order 11593 and 36 C.F.R. Part 800 make it clear that protection should be afforded to possibly affected possible historic sites at the earliest stages of a project. Hence, the determination by the secretary of interior that a property is eligible for inclusion in the National Register triggers all protections given to a property actually included until the eligibility is resolved. To determine that a property "may be eligible" introduces another level of uncertainty. 36 C.F.R. 800.3(f) refers to a determination that a property is "likely to meet the National Register Criteria."

The secretary of interior has determined that Moanalua Valley is not a property of national historic significance. Who then resolves the question of whether it is of local historic significance? Local officials having jurisdiction over these matters have determined that Moanalua Valley is at best of only marginal historic value.

Moanalua Valley has received the protections afforded an historic site while this controversy has been going on. Construction of the highway has been enjoined (albeit for other reasons), and the designation of the valley as an

historic site has been considered and reconsidered by federal and state officials. The final upshot of all this activity is that Moanalua Valley has not been placed on the National Register nor designated for preservation under state statutes.

I conclude that 4(f) does not apply to Moanalua Valley.

F. Air Quality

Upon conclusion of the trial on the merits, plaintiffs withdrew this cause of action, relating to the requirements of 23 U.S.C. § 109(a) and (j).

G. The National Historic Preservation Act

The National Historic Preservation Act and supporting orders, regulations, instructions, and policies, require the identification and protection of properties of national, state, or local historic significance, and the inclusion of information relating thereto in the EIS.

It is conceded that the NHPA procedures were eventually completed with respect to Pohaku ka Luahine and Moanalua Valley on September 19, 1974. This was two months after the EIS was approved. Plaintiffs argue that this is a violation of PPM 90-1 and CEQ Guidelines which require inclusion of NHPA information in the EIS.

On the other hand, PPM 90–1 refers to material which is pertinent and available, and CEQ Guidelines qualify this suggestion with the phrase "to the extent possible".

Notwithstanding the contention of defendants that Moanalua Valley is not an historic site, NHPA procedures with respect to the valley were completed.

Nothing in law or reason requires the EIS to be resubmitted to reflect subsequent NHPA compliance.

Plaintiffs raise here again the failure of defendants to identify any other historic properties. In the 10 years that

this project has been under consideration, none outside Moanalua Valley that are adversely affected by the project have been seriously brought to the attention of the responsible officials.

H. Project Approval on the Urban System

Instructional Memorandum 50–3–71 instructs the division engineer of FHWA in approving any programs for federal-aid highway projects in an urbanized area to find that certain conditions exist.

Plaintiffs read this memorandum as requiring a finding that the project has local concurrence and approval. They argue that the city has withdrawn its support of H-3 and therefore the division engineer cannot make the necessary finding.

It is possible to read the memorandum in the sense contended for by plaintiffs. On the other hand, prior actions by the city in supporting H-3 cloud the issue. It would appear that H-3 was selected by local officials and the state highway department in cooperation with each other and that division engineer approvals were given at a time when H-3 was part of a program serving to implement an area-wide plan developed within the planning process and held currently valid by the policy board. H-3 was placed on the Oahu General Plan by ordinance of the city council. It is still there. The suspended design contracts were secured at a time when local officials did concur. Construction of the Moanalua-Haiku Segment is a long way off. There is no reason to anticipate violations that have not occurred or to enjoin action that is not clearly illegal.

I do not decide that plaintiffs have no standing to raise this issue, but I do suggest that the proper party to litigate the matter would be the City and County of Honolulu, and that by its failure to object to approvals by the division

engineer, it is in effect concurring therein. I am also aware that there may well come a time when FHWA officials will find that the 3C process has broken down on Oahu, at which time they may have to suspend federal-aid to highways until the process is reestablished.

GENERAL CLAIMS

I have attempted to deal with each claim and argument made by any plaintiff. There was a general claim by plaintiffs that the entire process engaged in by state and federal officials was merely an exercise in justifying what had already been predetermined. As a general proposition, this is probably a valid observation concerning any human endeavor. People hear what they want to hear, see what they want to see. Yet it cannot be said that the pros and cons of H-3 and (T)H-3 have not been widely discussed in great detail.

The ultimate decision to go or not to go remains with the responsible federal, state, and local officials. The court does not decide whether (T)H-3 is a desirable project. Neither does the court decide whether compliance with applicable statutes, regulations, orders, directives, memoranda, charters, and policies could have been better. What the court does decide is whether compliance has been so deficient as to amount to non-compliance as a matter of law. Some of these determinations are simple; others require a balancing of numerous factors.

Three times in this litigation the court has decided that the responsible officials had not complied with the law. The deficiencies noted in those prior decisions have been corrected.

CONCLUSION

Defendants have complied with all applicable requirements of law set out in the complaints in Civil Nos. 72–3606 and 73–3794.

The injunction heretofore entered by stipulation and order on September 15, 1972, and the injunction entered by order on October 18, 1972, should be dissolved.

The foregoing shall constitute the court's Findings of Fact and Conclusions of Law required by Fed.R.Civ.P. 52(a).